IN THE SUPREME COURT OF FLORIDA

ROBERT LARKINS,

Appellant,

vs. CASE NO. 91,131

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Robert Larkins is again before this Court after being resentenced to death by the Honorable William Norris, Circuit Judge. Larkins' initial death sentence was remanded by this Court on May 11, 1995, due to the inadequacy of the trial judge's written order imposing the death penalty. Larkins v. State, 655 So.2d 95 (Fla. 1995). This Court directed the trial judge to reevaluate the aggravating and mitigating circumstances and to prepare a new sentencing order which expressly evaluated each mitigating circumstance proposed by Larkins.

In its opinion, this Court described the facts of the crime:

> On August 30, 1994, the body of Roberta Faith Nicolas was found lying face down on the floor of a Circle K store. Debbie Santos, a customer in the store that day, testified that she was in the store with her baby and her young son when she saw a man with tape on his face walk in. Santos knew this man and identified him as Robert Larkins. She testified that he had tape on his nose, forehead, and each side of his face. He pointed a rifle at Ms. Nicolas, the store clerk, demanded money, and then shot her. Larkins then went over to the counter where the cash register was located, and backed out of the store. At some point during this episode, Santos' baby began to cry.

655 So.2d at 97.

On July 16, 1996, a status hearing was held before the

Honorable J. David Langford, Circuit Judge (R. 36-47).[1] Judge Langford acknowledged that the original trial judge, William Norris, had retired and was no longer available to participate in the case (R. 37). He had scheduled the status hearing as it appeared that a new sentencing proceeding would be necessary (R. 38). Defense counsel agreed, and indicated his desire to speak with Dr. Dee in order to prepare for the sentencing hearing (R. 39). The prosecutor did not agree that a new jury recommendation was required, as this Court's opinion indicated only that the sentencing order needed elaboration, and expressed concern about the availability of his primary witness (R. 39).

Defendant Larkins spoke up at this point:

> THE DEFENDANT: Excuse me, Your Honor.
> MR. WELLS: Can you tell me what you're going to say? This is a status conference. You're going to have lots of time to say what you want to say.
> THE DEFENDANT: It basically coincides with what he just said.
> MR. WELLS: Well, tell me anyway.
> THE DEFENDANT: He's saying that his main witness may not be alive. I'm saying that the legal work I have presented - I have filed motions and stuff myself - that I can prove my accusations.
> MR. WELLS: Okay. Like I said, we will get a chance to talk over at the jail.

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[1]The record on appeal in this case consists of one volume. References to this record will be designated as "R." followed by the appropriate page number. References to the record on appeal from Larkins' trial and sentencing (Florida Supreme Court Case No. 78,866) will be designated as "OR." followed by the appropriate page number.

THE DEFENDANT: Okay.

(R. 39-40). The judge noted his understanding that a new sentencing proceeding was necessary anytime a new judge was substituted for the original sentencing judge (R. 41). The prosecutor did not disagree but asserted that the State's position had always been that Judge Norris should handle the resentencing, to which Judge Langford responded that his best information indicated Norris was not available, and he did not want the case to hang in limbo (R. 41).

The judge thereafter set another status hearing, agreeing to hear any argument by the State as to why a sentencing proceeding may not be necessary (R. 42-43). There was some discussion about whether to keep Larkins in the jail or to return him to the state prison, and Larkins spoke articulately about his need to have an opportunity to speak with his attorney, needing to prove accusations that could save his life (R. 44-45). The judge ordered that Larkins remain in the local jail for ten days before being returned to prison (R. 45).

The next transcribed hearing took place on October 8, 1996, before the Honorable William Norris (R. 48-62). Norris explained at the hearing that he had retired in January, 1995, but was aware that the case was remanded and had advised the Chief Judge that he intended to continue with the case (R. 49). Later it became

apparent that he would be unavailable for an extended period in 1996 and, not wanting the case to languish, he asked the Chief Judge to reassign the case (R. 49-50). He was surprised to hear recently that the State had requested his reassignment, and although he was concerned that so much time had passed, he agreed to accept the case and set this hearing to review the status (R. 50).

Defendant Larkins spoke up, referring to legal work he had filed in Polk County which would provide a different outlook on the case (R. 50-51). He claimed he could prove that the prosecutor had made mistakes, and he would be a free man if someone would consider his lawsuit, but no one had even responded to his allegations (R. 51). The judge asked if Larkins was represented by Mr. Wells, and Larkins complained that Wells had never met with him or shown him any respect; that he talked with Wells about two minutes on the phone, and Wells had sent an investigator to meet with him, he had showed the investigator his legal work, but the investigator had not understood what Larkins was trying to tell him (R. 52-53). Larkins also insisted repeatedly that he had no interest in his resentencing, he did not care at all about possibly getting a life sentence, noting he had turned down the opportunity to plead guilty and get a life sentence (R. 53). The court then asked defense counsel Wells to respond to Larkins' comments (R. 53). Wells

stated that he had anticipated having a new sentencing proceeding in this case; that his schedule had precluded him from meeting with Larkins after the last status hearing, but he had sent an investigator and intended to meet with Larkins at the prison; that he had filed motions for an investigator and a mental health expert to assist in preparing for the sentencing proceeding; and that when he met with Larkins briefly in the holding cell, Larkins had talked about his Polk County lawsuit. Wells had tried to explain the limited nature of the remand, the lack of jurisdiction in Polk County, and that the nature of the Polk lawsuit suggested it should be filed in Hardee County or even in federal court (R. 54-57). He noted that Larkins "has said to me that same thing that he just said to the Court that he does not want to be resentenced" (R. 57). Wells also indicated that he had concerns about Larkins' competency (R. 58).

The prosecutor responded that Judge Langford had determined a new sentencing proceeding would be necessary if a new judge was redrafting the sentencing order; the State Attorney had requested that the Chief Judge reassign Judge Norris to the case in order to avoid the need for a new jury sentencing (R. 58). The State Attorney's Office had not had any direct contact with Judge Norris about this case (R. 59). The prosecutor suggested that all that was needed at this point was for the court to rewrite the

sentencing order and impose the appropriate sentence (R. 59). When the court asked what motions had been filed by the defense, Wells responded that he had requested an investigator and the appointment of a psychologist (R. 60). Wells suggested that Dr. Dee be reappointed, as Dee had initially examined Larkins at the time of trial (R. 60). The prosecutor asked if the motion for a psychologist addressed the issue of competency, and Wells stated that it did: "It's filed pursuant to the Rules of Criminal Procedure that allows me to have a confidential person appointed to make a determination. And at the point I filed it, it was, in fact, filed for that reason. At that point to help me prepare for, in fact, we were going to pick a new jury as to whether or not Mr. Larkins was competent" (R. 61). Judge Norris indicated he would issue an order addressing whether he would have a new sentencing hearing or just redraft the prior order; he also granted the oral request for a competency examination (R. 62).

Another hearing was held on May 30, 1997, for the purpose of imposing sentence (R. 65-73). Larkins addressed the court and reiterated his dissatisfaction with counsel and his frustration with the lack of progress on his Polk County lawsuit (R. 67-69). He again emphasized that he was not interested in a life sentence, but wanted to get out of prison altogether (R. 68). The court noted that defense counsel Wells remained Larkins' appointed

attorney for this proceeding (R. 68). Wells noted for the record that Larkins had refused to meet with Dr. Dee, and suggested that Larkins was "at best marginally competent" (R. 69). Larkins repeated his desire for an evidentiary hearing and his lack of interest in the resentencing, noting "If I'm... If I'm considered to be so stupid and illiterate, the courts could have at least gave me the opportunity to look stupid by giving me an evidentiary hearing" (R. 70). He also explained his lack of cooperation with Dr. Dee: "Your Honor, I don't need Dr. Dee telling me what my credibilities are or what frame of mind that I'm in" (R. 70). The court thereafter advised Larkins of his right to appeal and pronounced sentence (R. 70-71).

A sentencing order was filed at the time of the pronouncement of sentence (R. 12-19). The court found two aggravating circumstances: prior violent felony convictions, and capital felony committed for pecuniary gain (R. 15). The court found both statutory mental mitigating factors and enumerated eleven nonstatutory factors (R. 16-18). After careful consideration, the court determined that the aggravating circumstances outweighed the mitigating factors, and sentenced Larkins to death (R. 18). This appeal follows.

SUMMARY OF THE **ARGUMENT**

Appellant Larkins' comments to the court below regarding his frustration with the judicial system and his dissatisfaction with the scope of the resentencing proceeding did not demonstrate any incompetence or desire for self-representation, and therefore his first two issues must fail. In addition, since this case was only remanded for a reweighing of the aggravating and mitigating factors and Larkins' personal participation was not required, any competency or self-representation issues would not have any affect on the trial court's actions and would not be relevant to the question of the propriety of Larkins' sentence.

A review of the record in this case clearly establishes that Larkins' death sentence is proportional when compared to factually similar cases in which death has been imposed. The victim in this case, Roberta Nicolas, was the second person Larkins has shot and killed in his life; her senseless death so that Larkins could obtain some easy money was a tragedy demanding the ultimate punishment. Both the facts of this case and Larkins' history serve to aggravate this murder, and the evidence offered in mitigation did not compel a life sentence.

Larkins' challenge to the weight given by the trial court to the mitigating factors is without merit. This Court has repeatedly emphasized that the weight to be assigned any factor falls within

the broad discretion of the sentencer. No error has been demonstrated with regard to the trial judge's consideration of the mitigating evidence.

Larkins' attack on the actions of the State Attorney in securing the reassignment of the original trial judge to the resentencing proceeding is not convincing. Certainly the State has an obligation to not waste time and resources conducting a full-blown jury resentencing proceeding when the original trial judge is willing and available to redraft the sentencing order, as mandated by this Court. The benefit of having the original judge that heard the sentencing evidence did not create an unfair advantage for the State. There was no legally cognizable reason for Judge Norris to be disqualified from the resentencing, and therefore there is no merit to this claim.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FAILING TO DETERMINE THE DEFENDANT'S COMPETENCY TO BE SENTENCED.

Larkins initially asserts that the court below should have suspended the sentencing proceeding and conducted a competency hearing. Several flaws are presented in Larkins' claim. The first is that, since this case was remanded only for reweighing of the aggravating and mitigating circumstances, it was not necessary for Larkins to be competent in order for this Court's mandate to be fulfilled. Florida Rule of Criminal Procedure 3.210 expressly acknowledges that

> The incompetence of the defendant shall not preclude such judicial action, hearings on motions of the parties, discovery proceedings, or other procedures that do not require the personal participation of the defendant.

Rule 3.210(a)(2). This Court has recognized that a trial court may accomplish the task of reweighing sentencing factors without holding an allocution hearing or permitting the defendant to address the court. Crump v. State, 654 So.2d 545, 548 (Fla. 1995); see also, Lucas v. State, 613 So.2d 408, 409 (Fla. 1992) (no error in court having prepared sentencing order before hearing argument), cert. denied, 510 U.S. 845 (1993). Since this Court's mandate only directed trial court action not requiring Larkins' participation,

any error in proceeding despite any claim of incompetence would be inconsequential.

In addition, the record does not reflect that a competency examination was necessary. Although defense counsel had requested the appointment of a psychologist to assist the defense based on his belief that a new sentencing proceeding before a jury would be held, he never filed a motion for a competency examination pursuant to Florida Rule of Criminal Procedure 3.210(b). Counsel's passing references to his concern about Larkins' competency do not qualify as a request for an examination. Kilaore v. State, 688 So.2d 895, 898 (Fla. 1996), cert. denied, 118 S.Ct. 103 (1997). Thus, the question presented is whether the trial court failed to fulfill its responsibility of ensuring that Larkins was competent at a material stage of the proceeding,

In considering this question, it is critical to note that there is nothing in the record which demonstrates reasonable grounds to have questioned Larkins' competency. Larkins relies on (1) Larkins' "frequent non-sensical ramblings" and "irrational refusal to be examined" by Dr. Dee; (2) defense counsel's assertions of his belief that Larkins was not competent; and (3) the trial court's order for an examination by Dr. Dee and findings with regard to mental mitigation (Appellant's Initial Brief, pp. 6, 8). As will be seen, none of these factors established a basis for

questioning Larkins' competency.

Larkins relies primarily on the fact that the trial judge, at one point, ordered him to be examined by Dr. Dee. However, the fact that an exam was ordered does not, standing alone, demonstrate that it was needed. The judge ordered the exam based on defense counsel's conclusory comments suggesting an exam would be appropriate, and when the court was considering conducting a full sentencing hearing before a new jury. The court's findings with regard to the mental mitigation similarly did not compel a competency exam, since Dr. Dee's prior testimony, the foundation for the court's findings, noted Larkins' competence at that time (OR. 1322). Clearly, a capital defendant is not required to be examined for competency every time mental mitigation is found. Therefore, Larkins' reliance on the trial court's actions and findings to establish the need for a competency exam is misplaced.

Nor were counsel's remarks sufficient to give rise to reasonable questions about Larkins' competency. The record reflects that counsel offered passing comments about Larkins' competency on two occasions. At the status hearing held on October 8, 1996, counsel stated, "I do want to inform Mr. Houchin [the prosecutor] that I do intend to move the Court at some point during this hearing for a competency examination because of such a grave concern with Mr. Larkins' competency to proceed" (R. 58). Counsel

had, at the beginning of the hearing, noted that he had filed motions for the appointment of a psychologist and the appointment of an investigator to assist him in preparing for a new jury sentencing proceeding (R. 56). Later in the hearing, counsel suggested that Dr. Dee be appointed, because counsel had worked with Dr. Dee many times and Dee had been involved with Larkins at the time of the original sentencing (R. 60). The prosecutor asked if the motion for the psychologist addressed competency, and counsel indicated that it did;[2] that it was filed pursuant to the rule "that allows me to have a confidential person appointed . . . to help me prepare for, in fact, we were going to pick a new jury" (R. 61). At the end of the hearing, the judge stated, "I'm going to grant that there be an examination to determine Mr. Larkins' competency at this point" (R. 62).

The final sentencing hearing was held on May 30, 1997 (R. 65). Prior to the court's pronouncement of sentence, defense counsel noted that Larkins had refused to meet with Dr. Dee, and that "from my experience," Larkins was "at best marginally competent to be sentenced" (R. 69). Larkins responded that he didn't "need Dr. Dee telling me what my credibilities are or what frame of mind that I'm in" (R. 70).

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[2]A review of the motion, contained in the supplemental record on appeal, clearly reveals that no competency issues were raised.

Rule 3.210(b)(1) requires a defense attorney to include in a motion for a competency determination "a recital of the specific observations of and conversations with the defendant" that formed the basis for the request, to the extent such may be disclosed without invading the attorney-client privilege. Defense counsel below has never identified any observations or conversations which might present a basis to question Larkins' competency. On these facts, none of his general comments regarding his concerns about competency mandated a competency hearing.

The final considerations offered by Larkins are his own statements and his refusal to meet with Dr. Dee. Although his brief suggests that his comments were "non-sensical ramblings," in fact his statements indicated his awareness of the purpose of the proceedings. The fact that he was not interested in being resentenced to life and expressed frustration that other claims of a postconviction nature were not being heard does not demonstrate incompetence. His statements are a far cry from the irrational behavior at issue in cases where this Court has remanded for resolution of competency issues. Compare, Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) (defendant rejected plea bargain based on belief he would be released on July 4, because it was Independence Day and because of the number of letters in his three names; indicated he got this information from a judge in a dream; laughed

at possibility of death sentence; had previously been found incompetent; had acted strangely prior to offense; had family history of extreme mental illness); Pridaeon v. State, 531 So.2d 951 (Fla. 1988) (several times during colloquy to determine if defendant understood consequences of waiving presentation of mitigating evidence, defendant demanded that the judge kill him; defendant made rambling statement to jury protesting his innocence but stating it was his purpose that the jury find him guilty; psychiatrist examined him and found him competent, but expressed doubts, noted it was borderline call, suggested short hospitalization and medication).

Larkins' brief represents that the letter in the record from the Public Defender's Office "provides the only glimpse" into Larkins' legal work, and speculates that after Larkins read this letter, he believed that he had filed an appeal, implicating "Hodges," who is speculated to be prosecutor Houchin. The record belies this representation and speculation. In fact, Larkins' "legal work" involved a lawsuit Larkins had filed in Polk County raising postconviction allegations, which attorney Wells had discussed with Larkins (R. 39-40, 50-52, 57). Thus, to the extent Larkins is suggesting his alleged incompetence was demonstrated by his reference to some fantasy legal work, his suggestion is not supported by the record.

Finally, Larkins' refusal to meet with Dr. Dee did not provide a basis for mandating a competency hearing. In fact, Larkins explained that he was not interested in Dee's opinion about his frame of mind (R. 70). This was consistent with his position that he would only get the relief he felt he was entitled to when his claims of prosecutorial misconduct were heard. Once again, his explanation and comments demonstrate that he was aware of what was happening, refuting the current claim of incompetence.

This Court has recognized that it is not necessary for an expert to successfully evaluate a defendant in order for a trial court to make a determination of competency. Muhammad v. State, 494 So.2d 969, 972 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987). When a defendant refuses to be examined, "[t]here is no duty for the court to order a futile attempt at further examination." Muhammad, 494 So.2d at 973. The fact that Larkins refused to meet with Dee cannot thwart the validity of the sentence imposed below.

At the time of Larkins' original sentencing, Dr. Dee expressly noted his competency (OR. 1322). Thus, he is presumed to be competent, and this issue need only be revisited if changed circumstances present a bona fide doubt as to his mental capacity. Hunter v. State, 660 So.2d 244, 248 (Fla. 1995), cert. denied, 116 S.Ct. 946 (1996). No such doubt is raised in the instant case. On these facts, Larkins has failed to demonstrate any error in the

trial court's failure to suspend the pronouncement of his sentence in order to conduct a competency hearing. Therefore, he is not entitled to relief on this issue.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST TO PROCEED *PRO SE.*

Larkins next contends that the court below should have conducted a Faretta[3] hearing in response to his request to represent himself. However, a review of the record clearly establishes that Larkins never unequivocally requested permission to represent himself. Since a Faretta inquiry is only required where there has been a clear and unequivocal request for self-representation, no error has been demonstrated.

Larkins relies on references he made to a separate lawsuit he had filed in Polk County, apparently raising claims of a postconviction nature, and to his dissatisfaction with his attorney to support his contention that he "unequivocally requested, in layman terms, to proceed pro se" (Appellant's Initial Brief, p. 19). His comments about his own legal work with regard to postconviction claims are not sufficient to establish any request for self-representation at his resentencing. In fact, if the comments now offered are reviewed in context, it is clear he was not seeking to represent himself. For example, immediately after the statements offered on page 19 of his brief, at the first status hearing transcribed in the record, defense counsel advised Larkins that "we will get a chance to talk over at the jail," to which Larkins responded, "Okay" (R. 40). Later, near the end of the same

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[3] Faretta v. California, *422 U.S. 806 (1975)*.

hearing, Larkins again mentions his legal work:

> I know I'm not perfect. But I know that I can save my own life by proving my accusations. All I'm asking is that can I *have the opportunity to correspond with my lawyer, or talk to him,* man, so that I can prove my accusations. That's all I ask for.
>
> I know if I'm back in prison I'm not going to have the proper time that I need to *talk to my lawyer* to show him my points and, you know, to discuss things with him. I'm asking give me a chance, please, to try to save my own life.

R. 45 (emphasis added). The court thereafter directed that Larkins be kept in the local jail for ten days, in order to have an opportunity to meet with his attorney (R. 45).

Furthermore, his comments demonstrate that he had no interest in being resentenced, even if his sentence were to be reduced to life, and if he had acted as his own attorney, he apparently would have waived any resentencing:

> If I can't speak to him myself and prove my accusations, Your Honor, I would rather they kill me than give me the resentencing. That's the way I feel. If I wanted a resentencing and tried to get a life sentence I would have pled guilty. You gave me that opportunity. I said go to trial (R. 53).
>
> ...
>
> I'm trying to save my life. I'm not trying to go to resentencing. If I wanted to plead guilty -- (R. 55).
>
> ...
>
> I'm not trying to stay in prison for the rest of my life (R. 67).
>
> ...
>
> I'm not fighting just trying to get a life sentence, I'm trying to go home, I'm trying to go to the streets.... I want to go home. I don't want to spend the rest of my life in

> prison (R. 68).
> ...
> Your Honor, if I wanted a life sentence I would have pled guilty (R. 70).

Although Larkins was anxious to forget the resentencing and have his case progress to the postconviction stage, he did not have the right to waive this Court's mandate, as this Court had previously determined that a new sentencing order was necessary so that this Court could fulfill its duty of appellate review. See generally, Hill v. State, 656 So.2d 1271, 1272 (Fla. 1995) (no Faretta right on direct appeal); Klokoc v. State, 589 So.2d 219 (Fla. 1991) (denying defendant's motion to dismiss appeal).

Larkins' assertion that his alleged Faretta requests "are indistinguishable from other requests which have been found adequate to invoke the right to proceed pro se," is without merit. The cases he has cited are easily distinguished. In Chapman v. United States, 553 F.2d 886 (5th Cir. 1977), the defendant unequivocally requested to represent himself in the case about to be tried, he was not merely advising the judge that he had done his own legal work in a separate proceeding. Scott v. Wainwriuht, 617 F.2d 99, 100 (5th Cir.), cert. denied, 449 U.S. 885 (1980), and Brown v. Wainwright, 665 F.2d 607, 609 (11th Cir. 1982), presented cases where written pleadings were filed indicating the defendant's desire to proceed *pro se.* No such written pleadings were filed in this case. In People v. Anderson, 247 N.W.2d 857, 860-861 (Mich. 1976), the defendant stated, "I ask that this part of the

Constitution apply to me also and I'll do the best I can in defending myself." In the instant case, Larkins made reference to other legal work he had performed, and he indicated that he was not pleased with his attorney - but he never clearly, unequivocally requested the opportunity to represent himself in his resentencing proceeding.

Larkins' reliance on Rios v. State, 696 So.2d 469 (Fla. 2d DCA 1997), is similarly misplaced. Rios involved a claim that the trial court should have conducted a proper inquiry into allegations that defense counsel was ineffective, and no Faretta question was presented. To the extent that Larkins suggests that his statements expressing dissatisfaction with his attorney required the court below to presume that he was attempting to represent himself, requiring a Faretta inquiry, this Court has rejected this suggestion. In State v. Craft, 685 So.2d 1292 (Fla. 1996), this court specifically held that expressions of disagreement or dissatisfaction with trial counsel do not require a trial judge to inform a defendant about his right to represent himself or conduct a Faretta inquiry. Such comments only require an inquiry into the competence of counsel. The record reflects that the judge below discussed the concerns raised with defense counsel, and Larkins admits he "is not now raising an ineffective assistance of counsel claim," (Appellant's Brief, p. 22).

On these facts, Larkins has failed to demonstrate any error in

the trial court's failure to advise him of his right to self-representation and conduct a Faretta hearing. Therefore, he is not entitled to relief on this issue.

ISSUE III

WHETHER THE DEFENDANT'S DEATH SENTENCE IS PROPORTIONAL.

Larkins next claim disputes the proportionality of his sentence of death. The purpose of a proportionality review to compare the case to similar defendants, facts and sentences. Tillman v. State, 591 So.2d 167 (Fla. 1991). A proportionality determination is not made by the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So.2d 274, 277 (Fla. 1993). A review of similar cases compared to the facts of the instant case shows that the sentence in the instant case was proportional.

This Court has previously upheld death sentences for murders committed during robberies or burglaries, where the defendants had prior violent felony convictions, as in this case. Shellito v. State, 701 So.2d 837 (Fla. 1997) (same aggravating factors; defendant was eighteen years old, had difficult childhood, learning disabilities, history of mental health treatment and drug and alcohol abuse); Mendoza v. State, 700 So.2d 670 (Fla. 1997); Mungin v. State, 689 So.2d 1026 (Fla. 1996), cert. denied, 118 S.Ct. 102 (1997); Hunter, 660 So.2d at 244 (same aggravating factors; mitigation included fetal alcohol syndrome, narcissistic personality disorder, abuse and neglect as child); Clark v. State, 613 So.2d 412 (Fla. 1992), cert. denied, 510 U.S. 836 (1993); Hayes

v. State, 581 So.2d 121 (Fla.) (same aggravating factors; defendant was eighteen years old, with low intelligence, developmental learning disabilities, product of deprived environment, extensive history of drug and alcohol abuse), cert. denied, 502 U.S. 972 (1991); Freeman v. State, 563 So.2d 73, 75 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Carter v. State, 576 So.2d 1291 (Fla. 1989); Hudson v. State, 538 So.2d 829 (Fla.), cert. denied, 493 U.S. 875 (1989).

Larkins claims that death is not warranted because this case merely presents a "robbery gone bad" situation, comparable to Terry v. State, 668 So.2d 954 (Fla. 1996). In Terry, however, the "prior" conviction was based on a contemporaneous conviction as a principal for an aggravating assault committed by Terry's codefendant. This Court emphasized the significance of that distinction in Mendoza:

> However, in Terry and *Jackson* [575 So.2d 181 (Fla. 1991)] the trial courts based prior-violent-felony aggravating circumstances upon armed robberies which were contemporaneous with the murders. By contrast, the trial court in this case based the prior-violent-felony circumstance upon appellant's previous armed robbery conviction in the Robert Street case. Thus, appellant's prior conviction of an entirely separate violent crime differs from the aggravation found in Terry and *Jackson.*

700 So.2d at 679. Clearly, this factor is entitled to significant weight. See, Duncan v. State, 619 So.2d 279, 281 (Fla.) (upholding death sentence where only aggravating factor was prior violent

felony conviction; this Court upheld twelve of the fifteen mitigating factors found by the trial court), cert. denied, 510 U.S. 969 (1993).

Another distinction between Terry and the instant case exists with regard to the actual facts of the crime. In Terry, "the circumstances surrounding the crime [were] unclear," and this Court found that there was evidence to support the defense theory of a robbery-gone-bad. 668 So.2d at 965. Although Larkins suggests that he murdered Ms. Nicholas on a reactive or impulsive impulse, there were two eyewitnesses that testified to the circumstances surrounding the shooting. And although Dr. Dee concluded that Larkins' had poor impulse control, neither eyewitness described Larkins as irritated or shooting out of impulse. No one testified that Ms. Nicholas was struggling or otherwise resisting the robbery. Thus, the evidence in this case is contrary to a theory that Ms. Nicholas died in a robbery that merely got out of hand.

In considering the proportionality of Larkins' sentence, it is important to review the testimony presented to support the trial court's findings with regard to'mitigation. Dr. Henry Dee, a clinical psychologist, testified that he evaluated Larkins on December 17, 1991 (OR. 1307). He conducted a clinical interview in order to provide a context within which he could analyze Larkins' personality and brain functioning; none of his conclusions were based on the biographical history provided by Larkins (OR. 1309).

He then performed a series of neuropsychological tests, initially assessing Larkins' general mental functioning, or intelligence (OR. 1310). Dee determined that Larkins' performance fell within the low average level of intelligence, at about the twentieth percentile, which Dee characterized as unremarkable (OR. 1314-15). Dee also noted a substantial memory impairment, suggesting some unspecified brain damage that probably affected both hemispheres (OR. 1315-16). Dee concluded that the balance of the neuropsychological test results were normal, with the exception of right/left orientation (OR. 1316). The personality testing conducted by Dee indicated that Larkins had poor impulse control and increased irritability (OR. 1317-18). Thus, Dee described Larkins' current medical condition "as having an organic brain syndrome with mixed features," meaning-it had both a cognitive component -- memory impairment, and an affective/emotional component -- increased irritability and lack of impulse control (OR. 1318).

Dee stated that there was no way to determine how long this condition had been present; there was no history of cerebral insult or trauma, and Dee suggested that the brain damage could have been caused by Larkins' chronic use of drugs or alcohol (OR. 1319). Although neither the cause nor the time frame of Larkins' "brain damage" could be identified, Dee noted that Larkins' history indicated learning problems from early on (OR. 1320). When asked

extreme disturbance, there was no evidence to support the court's finding of the second statutory mitigator, substantial impairment of the appreciation for the criminality of Larkins' conduct. Clearly, Dee equivocated on whether Larkins' alleged brain damage would even have any affect on his capacity to appreciate the criminality of his actions. Furthermore, although Dee indicated that Larkins' heightened irritability may have contributed to this murder, the facts of the robbery, as testified to by an eyewitness, Debbie Santos, reflect that Larkins entered the store, demanded money from the clerk, then coldly shot her before taking the cash register and backing out of the store.

The other cases cited by the appellant do not establish a lack of proportionality in this case. In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), the facts presented "a bizarre robbery scheme by an immature and emotionally disturbed young man who impulsively fired his weapon when surprised by a police officer." Walls v. State, 641 So.2d 381, 391 (Fla. 1994), cert. denied, 115 S.Ct. 943 (1995). There was extensive mental mitigation in Fitzpatrick, and a defendant with an emotional age between nine and twelve years old. 527 So.2d 812. Although mental mitigation was presented and found in this case, it pales in comparison to that noted in Fitzpatrick.

Larkins' reliance on Robertson v. State, 699 So.2d 1343 (Fla. 1997), cert. denied, 118 S.Ct. 1097 (1998), Kramer v. State, 619

So.2d 274 (Fla. 1993), and Farinas v. State, 569 So.2d 425 (Fla. 1990), is also misplaced. The mitigation in Robertson included a borderline IQ, extensive mental problems, statutory impairment based on drug and alcohol use, and an abusive, deprived childhood; Robertson was a nineteen year old, with a long history of mental illness, under the influence of drugs and alcohol at the time of the crime, that "[f]or no apparent reason, . . . strangled a young woman who he believed had befriended him." 699 So.2d at 1347. The evidence in Kramer, "in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk." 619 So.2d at 278. Farinas was an emotionally disturbed defendant who shot a former girlfriend as a result of a heated domestic confrontation.

Finally, Sinclair v. State, 657 So.2d 1138 (Fla. 1995); Thompson v. State, 647 So.2d 824 (Fla. 1994); and Clark v. State, 609 So.2d 513 (Fla. 1992), involved only one aggravating factor; in such cases, this Court has approved the death penalty only where there is nothing or very little in mitigation. Soncrer v. State, 544 So.2d 1010, 1011 (Fla. 1989). Thus, none of Larkins' cases are truly comparable to the instant case.

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this murder compels the imposition of the death penalty, Roberta Faith Nicholas' murder was the result a

totally unprovoked attack by Larkins, for no better reason than he wanted to rob her convenience store. The prior violent felony convictions demonstrate that Larkins has the propensity to commit serious, violent and inexcusable crimes. When compared to similar cases where the death penalty has been imposed and upheld, this case clearly involves the necessary aggravation to set it apart from other capital murders, warranting the extreme sanction of death. Accordingly, the sentence imposed in the instant was properly imposed, and should not be disturbed in this appeal.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY FAILING TO GIVE SUFFICIENT WEIGHT TO THE MITIGATING EVIDENCE.

Larkins next challenges the weight assigned by the trial judge to the mitigation evidence presented. Specifically, he claims that the trial court (1) improperly diluted the statutory mental mitigation by discussing some of the evidence presented in Dr. Dee's testimony as nonstatutory mitigation; and (2) failed to consider and sufficiently discuss Larkins' organic brain damage as a mitigating circumstance. A review of the penalty phase evidence and the sentencing order establishes that these claims are without merit.

As to the trial court's discussion of the statutory mental mitigation, a review of the testimony supporting the trial court's findings clearly demonstrates that, based on what was presented, the court's discussion was sufficient. Larkins primarily criticizes the trial court's alleged failure to discuss how Larkins' mental disturbance affected Larkins, and how it affected the crime itself. To the extent that the trial court failed to discuss these aspects of the mitigation offered, it is because there was no testimony presented as to how either Larkins or his crime were affected by his mental OK emotional problems. Dr. Dee testified that Larkins had an unremarkable low average intelligence, substantial memory impairment, difficulties with

right/left orientation, poor impulse control, and increased irritability (OR, 1314-18). The court below expressly weighed these attributes as nonstatutory mitigation (R. 17-18). No other manifestations of his mental problems were identified by Dr. Dee, and none have been suggested by Larkins.

This Court has repeatedly recognized that the relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge. Blanco v. State, 706 So.2d 7, 10 (Fla. 1997); Cole v. State, 701 So.2d 845, 852 (Fla. 1997); Bell v. State, 699 So.2d 674, 678 (Fla. 1997), cert. denied, 118 S.Ct. 1067 (1998); Campbell v. State, 571 So.2d 415, 420 (Fla. 1990). Such discretion includes the determination of whether to weigh mental mitigation as statutory or nonstatutory mitigation. See, James v. State, 695 So.2d 1229, 1237 (Fla.), cert. denied, 118 S.Ct. 569 (1997). In the instant case, the sentencing order clearly reflects that the trial court weighed the evidence of Larkins' mental problems as both statutory and nonstatutory circumstances. He weighed the existence of Larkins' organic brain damage, and the effect this damage had on his ability to appreciate the criminality of his conduct, as statutory mitigation; he weighed the manifestations of the damage, and the effect they had on the circumstances of the crime, as nonstatutory mitigation. Thus, rather than diluting the evidence, as Larkins now suggests, the court below probably gave it more weight than it deserved.

As to the trial court's treatment of Larkins' organic brain damage, Larkins correctly notes that this factor was discussed in the sentencing order. Once again, his concern that the discussion was "cursory" is not a complaint about the court's action, it is really a complaint about the sufficiency of the evidence actually presented. Although Dr. Dee indicated that he believed Larkins suffered from "an organic brain syndrome with mixed features," he was unable to describe the nature of the syndrome, the cause of the syndrome, or how long Larkins may have been affected by it (OR. 1318-20). As previously noted, the only effects of the unspecified brain damage which were discussed -- low average intelligence, memory impairment, poor impulse control, greater irritability -- were expressly weighed in considering the appropriate sentence to be imposed (R. 16-18). Thus, no error has been presented.

In sentencing Larkins to die for the murder of Roberta Faith Nicholas, the trial judge complied with all applicable law, including the dictates of this Court's decision in Camsbell. He expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of his findings by discussing the factual basis for the aggravating and mitigating factors. The trial court's alleged failure to outline any additional factual support for his findings should not be deemed error, since the court adequately addressed the existence of the factors. See, Bonifay v. St-, 680 So.2d 413, 417 (Fla. 1996)

(although order failed to specifically mention "organic brain damage," Campbell was satisfied since discussion of attention deficit disorder referred to organic brain damage); Munain, 689 So.2d at 1031 (finding consideration of mitigating factors encompassed in discussion of other factors); Barwick v. State, 660 So.2d 685, 696 (Fla. 1995) (finding sufficient consideration of evidence of child abuse, despite rejection of abuse as mitigator, based on language in order that court considered and weighed all applicable aggravating and mitigating circumstances established by the evidence or on which significant evidence had been produced), cert. denied, 116 S.Ct. 823 (1996).

Finally, even if legitimate concerns as to the adequacy of the trial judge's articulation of his findings exists, there is no reason to remand this cause for resentencing since it is clear that any elaboration on the sentencing order would not result in the imposition of a life sentence. Any error relating to the sentencing order's failure to discuss every possible aspect of mitigation is clearly harmless beyond a reasonable doubt, because even as discussed in Larkins' brief, the mitigation does not offset the strong aggravating factors found. Therefore, this Court should affirm the sentence as imposed. Lawrence v. State, 691 So.2d 1068, 1076 (Fla.), cert. denied, 118 S.Ct. 205 (1997); Kilaore, 688 So.2d at 895 (failure to expressly comment on mitigation, if error, was harmless where evidence presented and judge was cognizant of

factor); Barwick, 660 So.2d at 696; Armstrong v. State, 642 So.2d 730 (Fla. 1994), cert. denied, 115 S.Ct. 1799 (1995); Wickham v. State, 593 So.2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992); Cook v. State, 581 So.2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991). Larkins concludes this issue by alleging that a proper assessment of his mental health mitigation would demonstrate that his sentence is disproportional when compared with Livinaston v. State, 565 So.2d 1288 (Fla. 1988). Although this argument should be rejected for the reasons discussed in Issue III, it is significant to note that Livingston was seventeen years old at the time of his crimes, while Larkins was thirty-seven (OR. 5). In addition, Livingston was severely beaten as a child, had a marginal level of intellectual functioning, and had extensively used cocaine and marijuana. In light of this mitigation, no disproportionality has been shown, and there is no basis to disturb Larkins' sentence presented in this issue.

ISSUE V

WHETHER THE STATE COMMITTED MISCONDUCT BY REQTJESTING THAT THE ORIGINAL SENTENCING JUDGE PRESIDE AT THE RESENTENCING.

Larkins' final claim concerns the State's actions requesting that the resentencing proceeding be conducted by the original sentencing judge. In this issue, Larkins suggests that the State created an appearance of judge shopping by contacting the Chief Judge to request that Judge Norris be reassigned to impose sentence. Larkins also uses this claim as a springboard to contest Judge Norris' qualifications to handle the resentencing, noting that Norris had not attended the capital case training required by Florida Rule of Judicial Administration 2.050(b)(10). Larkins is plainly not entitled to relief in this issue.

It must be noted initially that much of this issue, as presented, is not properly before this Court. To the extent that Larkins is complaining about the State contacting the Chief Judge ex *parte*, defense counsel objected to the communication below (R. 56), but did not request any particular relief at that time and, until his appellate brief, has never suggested that such communication required Judge Norris' disqualification. In fact, a written Motion to Disqualify was filed well after Larkins learned of the communication, but the Motion makes no reference to any allegation of an improper ex *parte* contact by the State (R. 9). Since no written motion was filed requesting Judge Norris to recuse

himself on this basis, this issue is obviously barred. Rogers v. State, 630 So.2d 513, 516 (Fla. 1993) (requiring motions for disqualification to be in writing).

Even if this aspect of the issue is considered, no relief is warranted. The record of Larkins' resentencing is crystal clear that, when Judge Langford indicated that he intended to conduct a new sentencing proceeding before a jury, his basis for doing so was the established case law requiring that a new proceeding be held whenever the original sentencing judge was not available for resentencing. See, Craig v. State, 620 So.2d 174, 176 (Fla. 1993). At the status hearing of July 16, 1996, Judge Langford stated, "And my reading of the case law is that whenever you have a judge substituting in, and the sentence is overturned by the Appellate Court, that the new sentencing judge, who did not hear the evidence during the penalty phase of the trial, should conduct a new sentencing proceeding before a jury" (R. 41). It is equally clear that the State consistently maintained that Judge Norris should be brought back to handle the resentencing, in order to avoid having to conduct a new sentencing proceeding (R. 41, 58).

Furthermore, the State did not have any improper contact with Judge Norris -- the only allegation of ex *parte* communication is based on the State's apparent request to the Chief Judge to assign Judge Norris to this resentencing (R. 58-59). Although Larkins submits that "the record speaks loudly to the State's perception of

Judge Norris as more favorable than Judge Langford," and that the State Attorney's Office actively solicited Judge Norris' assignment "because of his previous predilection of sentencing Mr. Larkins to death," these speculative accusations are totally unfounded (Appellant's Initial Brief, pp. 38, 39). In fact, the record only speaks loudly to the State's attempt to fulfill this Court's directive: "that fairness in this difficult area of death penalty proceedings dictates that the judge imposing sentence *should be* the same judge who presided over the penalty phase proceeding." Corbett v. State, 602 So.2d 1240, 1244 (Fla. 1992) (emphasis added); see also, Barwick, 660 So.2d at 692 (conclusory allegation of *ex parte* communication did not provide legally sufficient basis for disqualification).

Finally, Larkins' assertion that the State's *ex parte* contact with the Chief Judge resulted in "fundamental detriment" to him is without merit (Appellant's Initial Brief, p. 36). No such detriment is identified; and the only possible disadvantage to Larkins created by Judge Norris' assignment was being deprived of a windfall "second bite at the apple" with respect to a jury recommendation, in the hopes that something more favorable than the 10 - 2 recommendation for death previously obtained would be forthcoming. The "detriment" of being denied something to which you are not entitled is certainly not fundamental, and does not demonstrate any error in the proceedings below,

Larkins' dispute with Judge Norris' denial of his written Motion to Disqualify, based on Norris' failure to have completed the "Handling Capital Cases" course mandated by Rule 2.050 (b) (10), is similarly unpersuasive. As noted below, the motion was legally insufficient because lack of compliance with an administrative rule does not legally require disqualification and because Rule 2.050(b)(10) was not intended to, and did not retroactively apply to, the situation at hand. That the Rule should not apply is a reasonable inference based on the Rule's express acknowledgment that it would not preclude a judge from handling collateral proceedings if that judge had presided over the original trial or earlier collateral proceedings. Even if the Rule did apply, any noncompliance with the rule would not be a basis for disqualificat ion, since it would not create a reasonable fear that a defendant would not receive a fair trial due to the noncompliance. In fact, the written Motion did not allege that Larkins' reasonably believed that he could not receive a fair resentencing by Judge Norris. See, Cave v. State, 660 So.2d 705 (Fla. 1995) (discussing standard). Therefore, the Motion to Disqualify was properly denied.

Larkins has failed to demonstrate any error due to Judge Norris' presiding over his resentencing. Therefore, he is not entitled to be resentenced by a different judge.

CONCLUSION

Based on the foregoing arguments and authorities, Larkins' sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Dwight M. Wells, Esq., 304 S. Albany Ave., Tampa, Florida, 33606, this 11th day of June, 1998.

Carol M. Dittmar

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