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IN THE SUPREME COURT OF FLORIDA

CASE NO. 91-131

ROBERT LARKINS,

APPELLANT,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR HARDEE COUNTY

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

In this brief the Appellant, Robert Larkins, will be referred to by name or as Appellant. The Appellee will be referred to as the State.

Citations to the record on appeal will be parenthetically designated by the symbol (R,) followed by the specific page reference (s). Citations to the trial record will be designated by the symbol (Tr,) followed by the specific page reference (s). Citations of authority are in the form prescribed by Florida Rules of Appellate Procedure 9.800.

STATEMENT OF THE CASE

This is an automatic direct appeal from judgement of a death sentence entered following remand before the Honorable William A. Norris[1] of the Tenth Judicial Circuit of Florida, in and for Hardee County.[2]

On October 4, 1991, Mr. Larkins was convicted of first-degree murder,[3] and on October 7, 1991, the jury recommended death. The trial court followed the jury's recommendation, imposing a death sentence on October 16, 1991.[4] This Court affirmed the conviction but vacated the death sentence and remanded. Larkins v. State, 655 So. 2d 95, 101 (Fla. 1995).

Because the trial court failed to adequately evaluate the mitigation proffered at trial, this Court held that the Sentencing Order "deprived [it] of meaningful review." Id. In particular, this Court found that extensive mitigation was not considered:

> (1) Larkins' previous conviction was not murder but manslaughter; (2) he was a poor

[1] J. Norris was a senior judge called from retirement to specially proceed in this case.

[2] In this brief, the clerk's record on appeal for remand is cited as "R." the court reporter's transcription of the proceedings is cited as "Tr." and the record of the first trial's sentencing phase is cited as "O.R."

[3] Mr. Larkins was also found guilty of one count of armed robbery.

[4] This first sentencing proceeding was also before J. Norris.

reader; (3) he experienced difficulty in school; (4) he dropped out of school at the fifth or sixth grade; (5) the offense was the result of impulsivity and irritability; (6) he drank alcoholic beverage the night of the incident; (7) he functions at the lower 20% of the population in intelligence; (8) he came from a barren cultural background; (9) his memory ranks in the lowest one percent of the population; (10) he has chronic mental problems possibly caused by drugs and alcohol; (11) he is withdrawn and has difficulty establishing relationships.

Id. at 100-101. Therefore, this Court remanded and "direct[ed] the trial court to reevaluate the aggravating and mitigating circumstances, to resentence the defendant, and to enter a new sentencing order. . . ." Id. at 101.

On July 16, 1996, the Honorable J. David Langford presided over a resentencing proceeding to determine the status of this Court's mandate. R.41. J. Langford indicated that he was prepared to "conduct a new sentencing proceeding before a jury." Tr. 46. At this time, Mr. Larkins notified the trial court that he had filed legal work, including motions. Tr. 45. During this hearing, J. Langford recognized Mr. Larkins' scheduled meeting with Dr. Dee, a clinical psychologist, who testified for the defense in the initial trial's sentencing proceeding. Tr. 47. However, to allow the State an opportunity to present arguments rebutting the need for an entirely new sentencing proceeding, J. Langford scheduled a status conference for September 3, 1996.

On October 8, 1996, a motion proceeding was held before J.

Norris. R. 53. At this time, J. Norris indicated that he had retired on January 1, 1995. Tr. 54. He further noted that the State Attorney's Office solicited the Chief Judge to reassign the case to him.[5] Tr. 55. The Chief Judge, in turn, contacted J. Norris to request that he in fact be reassigned to the case. Tr. 55. During this hearing, Mr. Larkins again informed the trial court that he had filed a lawsuit, proceeding against the Assistant District Attorney. Tr. 58. After "expressing . . . concern of the fact that so much time had now elapsed," J. Norris granted "that there be an examination to determine Mr. Larkins' competency at this point."[6] Tr. 55, 67. Lastly, J. Norris deferred ruling upon whether an entirely new sentencing proceeding was warranted or a simple redrafting of the sentencing order. Tr. 67.

On May 30, 1997, J. Norris presided over the Sentencing Hearing where he again sentenced Mr. Larkins to death. Tr. 34. At this time, Mr. Larkins stated that defense counsel was not his counsel and reemphasized the "pending" legal work that he filed, including his appellate brief. Tr. 31, 35. During this hearing, J. Norris was again reminded that Mr. Larkins, after numerous attempts by defense counsel, had refused to cooperate with Dr.

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[5] However, J. Norris stated that he was, in fact, "furnished a copy of the letter [by the State Attorney's Office] that had been written to Judge Davis [the Chief Judge]." Tr. 64.

[6] The examination was to be conducted by Dr. Dee.

Dee. Tr. 32. Indeed, J. Norris stated in the new Sentencing Order that "the defendant has refused to cooperate with Dr. Dee and that as of the time of the preparation of this order, no report from Dr. Dee has been filed." R. 20.

In the new Sentencing Order, the trial court found the same two aggravating circumstances as in the initial sentencing: (A) the defendant was previously convicted of a felony involving the use or threat of violence to a person, namely, 1973 manslaughter and assault convictions occurring in St. Louis, Missouri; and (B) the felony was committed for pecuniary gain, i.e. during the commission of an armed robbery. R. 22. However, the trial court found two statutory and eleven non-statutory mitigating circumstances not previously found in the initial sentencing order. The statutory mitigating circumstances were: (A) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (B) the defendant acted under extreme duress or under the substantial domination of another person. R. 23-24. The eleven non-statutory mitigating circumstances found were: (1) the defendant's previous conviction was for manslaughter, not murder; (2) the defendant is a poor reader; (3) the defendant experienced difficulty in school; (4) the defendant dropped out of school during either the fifth or sixth grade; (5) the defendant functions at the lower 20% of the population in intelligence; (6)

the defendant came from a barren cultural background; (7) the defendant's memory ranks in the lowest one percent of the population; (8) the defendant has chronic mental problems possibly caused by drugs and alcohol; (9) the defendant is withdrawn and has difficulty establishing relationships; (10) the offense was the result of impulsivity and irritability; and (11) the defendant drank alcoholic beverages the night of the incident. R. 24-25.

I. ONCE IT BECAME APPARENT THAT THERE WAS A SUBSTANTIAL ISSUE AS TO MR. LARKINS' COMPETENCY, THE TRIAL COURT WAS UNDER AN OBLIGATION TO RESOLVE THE ISSUE BEFORE PROCEEDING FURTHER.

Because the trial judge appointed a clinical psychologist to evaluate Mr. Larkins and other factors indicated his incompetency to proceed, the trial court was required to finish the inquiry it had started. The United States Supreme Court held in Dusky v. United States, 362 U.S. 402 (1960), that the standard to determine whether a defendant is competent is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." However, in this case, the trial court out-right failed to ask Mr. Larkins or his counsel whether he could assist in the proceedings against him - even after (a) the trial court arranged for a competency evaluation of Mr. Larkins; (b) defense counsel, at every stage of the proceedings, repeatedly asserted his belief that Mr. Larkins was incompetent to proceed; and © Mr. Larkins' courtroom ramblings, including his irrational refusal to be examined by the clinical psychologist.

A. THE TRIAL COURT CLEARLY FOUND THAT THERE WAS A REASONABLE BASIS TO DOUBT MR. LARKINS' COMPETENCY IN ORDERING THAT HE BE EVALUATED.

By ordering that Mr. Larkins be psychologically evaluated for purposes of competency and not thereafter question him or defense counsel about his refusal to undergo examination, the trial court violated its duty to ensure that Mr. Larkins was competent to be sentenced. In addressing the issue of the indigent defendant's

right to psychiatric evaluation, the Supreme Court has held:

> that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (emphasis added).

Mr. Larkins' sanity was "a significant factor at trial." Indeed, it formed the very core of his extensive mental mitigation. But here, the issue devolves into why the trial court would appoint a clinical psychiatrist to evaluate the defendant's competency, only to utterly fail to inquire about its result, or lack thereof. Refusal to be examined by a psychologist may very well delve to the very nature of Mr. Larkins' competency. If nothing else, it is a right that Mr. Larkins needs to waive intelligently, upon inquiry from the trial court. Essentially, the trial court created the inquiry, and was duty-bound to finish it.

In this case, a clinical psychologist was, in fact, appointed by the trial court to examine Mr. Larkins. However, Mr. Larkins refused to be examined. The trial court never asked the defendant why he refused to undergo analysis; it never questioned Mr. Larkins whether he understood the ramifications of refusing to be examined; it never asked Mr. Larkins if he understood the reason for the re-sentencing; it never questioned the clinical psychologist why Mr. Larkins refused to be sentenced; it never asked defense counsel why

his client refused to see the psychiatrist; and it never asked the defendant if he wanted to proceed *pro se*. All this, after Mr. Larkins repeatedly, and with great insistence, exhibited behavior meriting inquiry.

B. THE CIRCUMSTANCES SURROUNDING THE RE-SENTENCING CREATED A REASONABLE GROUND TO BELIEVE THAT THE DEFENDANT WAS INCOMPETENT TO PROCEED, MANDATING A COMPETENCY HEARING.

The trial judge's failure to conduct a competency hearing warrants reversal of Mr. Larkins' death sentence and a remand for a competency hearing because (1) the defense counsel's stated concerns, (2) Mr. Larkins' frequent non-sensical ramblings in the courtroom, and (3) the trial judge's own findings, as evidenced in the mental mitigation set out in the new sentencing order, created circumstances rising to the level of reasonable ground to believe that Mr. Larkins was not competent to be sentenced.

When determining whether a competency hearing is required, the Fla. R. Crim. Proc. Rule 3.210(b) (West 1997) states that a hearing is necessary once "the trial court . . . has reasonable ground to believe that the defendant is not mentally competent to stand trial. . . ." (emphasis added). Thus, the standard is not whether the defendant is, in fact, incompetent to proceed but whether reasonable ground exist to question his competency. See Pridgen v. State, 531 So. 2d 951 (Fla. 1988); Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987) (determining whether the circumstances taken together "sufficiently raise a valid question as to [defendant's]

competency to stand trial"); Trawick v. State, 473 So. 2d 1235, 1239 (Fla. 1985) (employing the standard of whether defendant's conduct "raised a sufficient reasonable ground to believe that the [defendant] was incompetent"); and Unruh v. State, 560 So. 2d 266, 268 (Fla. 1st D.C.A. 1990), quoting Kothman v. State, 442 So. 2d 357, 359 (Fla. 1st D.C.A. 1983) (holding that the standard is "whether there is reasonable ground to believe that the defendant may be competent, not whether he is incompetent").

In determining whether there are reasonable ground to believe that a defendant may be incompetent to proceed, the trial judge must view the totality of the circumstances. The United States Supreme Court has held:

> [E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Drope v. Missouri, 420 U.S. 162, 180 (1975). In initially addressing the factors weighing towards a competency hearing, the Drope Court expanded the determination to include defense counsel's representations: "[i]t is nevertheless true that judges must depend to some extent on counsel to bring issues into focus." Id. at 176-177.

Florida Courts have expressly followed Drope's mandate that

emphasized defense counsel's findings be considered in determining whether the defendant may be incompetent to proceed: "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with 'the closest contact with the defendant' is unquestionably a factor which should be considered." Scott v. State, 420 So. 2d 595, 597 (Fla. 1982), quoting Drope, 420 U.S. at 177-178 n.13. In fact, "[t]he trial judge must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination is unnecessary, order an examination. . . ." Scott, 420 So. 2d at 598, quoting Jones v. State, 362 So. 2d 1334, 1336 (Fla. 1978) (emphasis added).

1. DEFENSE COUNSEL REPEATEDLY APPRISED THE TRIAL COURT THAT MR. LARKINS WAS LIKELY INCOMPETENT TO PROCEED.

Both times the sentencing court held hearings, defense counsel raised the issue of Mr. Larkins' competency.[1] During the first hearing before J. Norris, defense counsel strenuously brought to the trial judge's attention his "grave concern with Mr. Larkins' competency to proceed." Tr. 24. In referring to his motion to appoint a psychologist, defense counsel explicitly stated that he

[1] The first hearing conducted in accordance with this Court's mandate for resentencing was held by J. David Langford on 7/16/96. R. 41. Defense counsel also notified the trial court then as well that he planned to have Mr. Larkins submit to a psychological examination. Tr. 44.

filed the motion with the intent to "pick a new jury as to whether or not Mr. Larkins was competent."[2] Tr. 64. At the second hearing, counsel reiterated to the court that he believed Mr. Larkins was "at best marginally competent to be sentenced." Tr. 22. Again, the trial court recognized these concerns, memorializing defense counsel's warnings in his Sentencing Order.[3] Thus, it is clear from this record that defense counsel repeatedly raised the "red flag" that his client's competency to proceed was questionable at best; these concerns alone raise sufficient grounds to believe Mr. Larkins incompetent. In the face of these warnings, the trial court failed its duty under Drope and Scott to order

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[2] After being notified of its purpose, J. Norris did in fact grant the motion, appointing Dr. Dee to examine Mr. Larkins. Dr. Dee served as an expert witness in Mr. Larkins' 1991 trial wherein he testified during sentencing, and the trial judge subsequently found, that the crime was committed while Mr. Larkins suffered from both mental and emotional disturbance; suffers from an organic brain disorder, functions in the lower 20% of the population in intelligence and lowest one percent of the population for memory; and experiences chronic mental problems. R. 6-7 (trial judge basing certain statutory and non-statutory mitigation upon Dr. Dee's evaluation of Mr. Larkins).

[3] J. Norris evidenced his knowledge of defense counsel's assertions that Mr. Larkins may be incompetent to proceed when he stated in his Sentencing Order that "[s]everal status conferences were [sic] held including one wherein the question of the present competency of the defendant was raised." Tr. 20. The Sentencing Order also noted that "the defendant has refused to cooperate with Dr. Dee." Id. These findings should have resulted, at a minimum, in the trial court's further inquiry of Mr. Larkins' competence.

further inquiry into the matter before re-sentencing him to death.[4]

2. MR. LARKINS' BEHAVIOR AT THE SENTENCING PROCEEDINGS WARRANTED NOTHING LESS THAN AN INQUIRY BY THE TRIAL JUDGE.

Not only did defense counsel's warnings put the trial court on notice of Mr. Larkins' compromised mental state, but the trial court's own interactions with the defendant confirmed the necessity for a competency hearing. During the trial court's first encounter with Mr. Larkins for re-sentencing, Mr. Larkins exhibited behavior warranting inquiry. At one point, Mr. Larkins began talking of his "legal work." Tr. 55. According to Mr. Larkins, this "legal work" would prove his accusations and allow him to "walk out of the courtroom in the next five minutes." Tr. 56. Defense counsel also expressed to the court Mr. Larkins' inability to understand the scope of the hearing.[5] R.62.

On the date of sentencing, Mr. Larkins continued his incoherent ramblings and at one point stated "that this man [defense counsel] is not my counsel;" and then making obscure references to "letters" and "legal work:"

"I don't know who put this legal work in for a re-sentencing

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[4] Defense counsel notified the court of his intent to move for a competency hearing; however, Mr. Larkins refused to meet with Dr. Dee. A fact known to the trial court. *See supra* footnote 4.

[5] Defense counsel stated that whenever he attempted to explain the limited purpose of the proceedings, Mr. Larkins could only reply that he did not want to "be resentenced in terms of the execution issue." R.62.

> hearing and stuff, but I had legal work that was in before that." Tr. 31.
>
> "I done my own appeal briefs, Your Honor, and I already have filed my appeal brief. If you have read the letter you would understand it." Tr. 35.

The letter Mr. Larkins refers to during the Sentencing Hearing provides the only glimpse into what his "legal work" actually entails.[6] Perhaps better stated, it is the only record which evinces Mr. Larkins' understanding of the sentencing proceedings. The letter is from the Public Defender's Office which reads:

> I wanted to know that we tried to [sic] return your handwritten transcript notes on April 14, 1993, but they came back to us marked "inmate refused." If you do not want your notes, so you can forward them to your new attorney, they will be placed in your closed file here. It just seems a shame that by your refusing anything from the public defender's's office, you may be denying your new counsel the benefit of your notes.

R.11.

The letter is dated April 20, 1993 -- over <u>four years</u> before this sentencing hearing.[7] Mr. Larkins, after reading this letter, believed that he filed an appeal in this case, implicated [Hodges] as a possible witness,[8] and somehow felt that this "legal work"

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[6] This letter is the only piece of Mr. Larkins' "legal work" which made it on the record. R.11.

[7] The sentencing hearing occurred on May 30, 1997.

[8] During one of his ramblings, Mr. Larkins stated "That's all I ask for your Honor, the opportunity to prove my legal work because I want to proceed against Hodges [sic]." Tr. 58. "Hodges" is apparently Assistant District Attorney Houchin. Earlier in the same proceeding, Mr. Larkins claimed "[b]ecause I can show you that here's a man that indicts you, prosecutes you and at the same time, Your Honor, could have been a witness for

would convince the trial court to act in a way that is unclear. Therefore, Mr. Larkins' behavior at trial created the necessity for the trial judge to inquire into his competency to be sentenced.

3. THE TRIAL COURT'S OWN WRITTEN FINDINGS AND REMARKS ON THE RECORD DEMONSTRATED THE REASONABLE BELIEF THAT MR. LARKINS MAY HAVE BEEN INCOMPETENT AT THE TIME OF RE-SENTENCING.

The trial court made numerous findings and remarks which should have elicited questioning concerning his competence. After witnessing Mr. Larkins' frequent ramblings, the trial judge appointed Dr. Dee, a clinical psychologist, to examine him, knowing of defense counsel's concern of Larkin's incompetency. The trial judge then, in the Sentencing Order, noted the "question of the present competency of the defendant." Tr. 20. The trial judge further recognized that Larkin's "refused to cooperate with Dr. Dee and that as of the time for the preparation of this order, no report from Dr. Dee has been filed." Tr. 20. The trial judge refused to question Mr. Larkins about *why* he would refuse to cooperate in a psychological evaluation that would very well have safeguarded the traditional notions of due process and judicial economy.

Next, in the Sentencing Order, the trial judge delineated numerous factors which in themselves bring Mr. Larkins' competency to be sentenced to the very forefront. In particular, the trial

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my case for me." Tr. 56.

judge found both statutory mental mitigating factors and five non-statutory mitigating factors relating to Mr. Larkins' mental defects.[9] The five non-statutory mitigating factors evincing a concern of incompetency were: "(1) the defendant functions at the lower 20% of the population in intelligence, (2) the defendant's memory ranks in the lowest one percent of the population, (3) the defendant has chronic mental problems possibly caused by drugs and alcohol, (4) the defendant is withdrawn and has difficulty establishing relationships, and (5) the offense was the result of impulsivity and irritability."[10] R. 24-25.

The factors that (a) Mr. Larkins functions in the bottom of the population, (b) has chronic mental problems, and (c)experiences difficulty in establishing relationships are immutable, namely they existed at this sentencing just as they existed during the crime. The existence of this extensive mental mitigation combined with Mr. Larkins' repeatedly bizarre behavior, defense counsel's concerns about his client's ill health, and the court's recognition of these concerns all demonstrate that the trial court had more than sufficient grounds to require further inquiry into Mr. Larkins'

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[9] The two statutory mitigating factors illustrative of competency are "(1) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." R.22-24.

[10] These factors complement the trial court's first Sentencing Order, where it found that Mr. Larkins "suffers from organic brain damage." O.R.156.

competency but, tragically, did nothing about it.

In Pridgen v. State, 531 So. 2d 951 (Fla. 1988), this Court reversed the defendant's death sentence due to the trial court's failure to conduct a competency hearing during the sentencing phase of trial.[11] In finding that another competency determination still was necessary for sentencing, this Court relied upon defense counsel's assertion that the defendant was incompetent, the trial judge's *sua sponte* appointment of psychologists, the court's desire to hurry the trial "because of [defendant's] deteriorating mental condition," and the questionable "tactical decisions made by [defendant] to offer no defense to the state's recommendation of death." Id. at 955.

In this case, as in Pridgen, defense counsel emphasized his grave concern that Mr. Larkins was incompetent to be sentenced; the trial court not only appointed a mental health expert to examine Mr. Larkins but also found numerous mental mitigating factors; and noted Mr. Larkins' frequent non-sensical ramblings and refusal to be examined by Dr. Dee. Like Pridgen then, this Court must vacate Mr. Larkins' death sentence and remand for a determination of competency.

Likewise, in Tingle v. State, 536 So. 2d 202 (Fla. 1988), this Court vacated the defendant's sentence after finding that all

[11] The defendant in Pridgen underwent a competency hearing prior to trial, wherein he was held competent to proceed. Pridgen, 531 So. 2d at 952.

the circumstances before the trial court created reasonable ground to believe that the defendant may be incompetent to proceed. This Court relied upon defense counsel's allegations that the defendant stabbed himself with a pen and was hallucinating; as well as a mental health worker's "informal impression that [defendant] suffers from a paranoid schizophrenic process." Id. at 203. After the trial court in Tingle did conduct a cursory review of the defendant's mental health background, this Court found it lacking in the face of disturbing evidence to the contrary, and held that "[t]he trial judge's independent investigation was not sufficient to ensure that [defendant] was not deprived of his due process right of not being tried while mentally incompetent." Id.

As in the circumstances of Tingle, defense counsel raised a serious question as to Mr. Larkins' competency, adding that he planned to move for a competency hearing. Also, Mr. Larkins' mental health background, in light of the trial court's findings, evince the same need for a competency hearing. Lastly, worse than the trial judge in Tingle, Mr. Larkins' trial judge out-right failed to even inquire into Mr. Larkins' odd behavior, even after confronted with Mr. Larkins' letter proving his "allegations."

Accordingly, this Court must vacate the sentence and remand for a competency hearing. Hill v. State, 473 So. 2d 1253 (Fla. 1985); Pridgen, 531 So. 2d at 955; Tingle, 536 So. 2d at 203.

II. ASSUMING THAT THE TRIAL COURT HAD FOUND MR. LARKINS COMPETENT TO PROCEED AND TO MAKE THE DECISION, THE TRIAL COURT MUST BE

REVERSED FOR FAILING TO RESPECT HIS LAYMAN'S REQUEST TO PROCEED *PRO SE* AND TO HOLD A *FARETTA* HEARING.

If after a competency hearing, the trial court found Mr. Larkins competent to proceed, then it committed reversible error in not honoring Mr. Larkins' request to represent himself. When the accused makes an assertion of his right to proceed *pro se*, the trial court must respect that right, or hold a hearing to determine whether the accused is capable to represent himself. Explicitly, in Faretta v. California, 422 U.S. 806 (1975), the Supreme Court held that the constitutional right to counsel was the right to:

> the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel . . . shall be an aid to a willing defendant. . . .

Id. at 820 (emphasis added). See also, Traylor v. State, 596 So. 2d 957, 968-969 (Fla. 1992) (holding that the right of self-representation is "a highly personal choice concerning the allocation of one's own individual resources"). Under the Faretta rule, once the right to self-representation is invoked, the trial court cannot allow "[p]articipation by . . . counsel without the defendant's consent [which] destroys the . . . perception that the defendant is representing himself." McKastle v. Wiggins, 465 U.S. 168, 178 (1984). Indeed, "[f]orcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." Faretta, 422 U.S. at 817.

This Court has likewise held that "Faretta inquiries are required where a defendant has made an unequivocal request for self-representation." State v. Roberts, 677 So. 2d 264, 265 (Fla. 1996). See Fla. R. Crim. Proc. Rule 3.111(d) (West 1997) (delineating the requirements necessary to preserve the right of an indigent defendant to proceed *pro se*).

Mr. Larkins unequivocally requested, in layman terms, to proceed *pro se* at every proceeding in this matter. First, before J. Langford, Mr. Larkins asserted this right:

> "I'm saying that the legal work I have presented - I have filed motions and stuff myself - that I can prove my accusations. Tr. 45 (emphasis added).

Second, and in the first proceeding before J. Norris, Mr. Larkins again repeatedly expressed his intent, in layman terms, to proceed *pro se*:

> "[I] can prove, Your Honor, that without a shadow of a doubt that I could walk out of this courtroom in five minutes because it won't take that long." Tr. 56 (emphasis added).

> "[N]o one will give me a chance to speak. . . . I filed the legal work in Polk County. I filed a lawsuit in Polk County. Under plain and simple terms that if I can prove my accusations that the court has ten days in which to respond." Tr. 56 (emphasis added).

Mr. Larkins, at the same hearing, then requested of the trial court:

> "And if the Court will allow me the proper time to show them my legal work, Your Honor, I'm sure . . . I'll sure be pleased with it." Tr. 57 (emphasis added).

During the most telling dialogue between Mr. Larkins and the trial court, immediately following his above remarks, Mr. Larkins responded to the trial court's inquiry about whether defense counsel represents him:

> "This man has never talked to me. . . . So, how he be representing me." Tr. 57.

At the sentencing hearing, Mr. Larkins made no mistake about asserting his constitutional right to proceed *pro se* in the best language he knew how:

> "Your Honor, the last time I was here in Court, I clearly stated that this man is not my counsel. Your Honor, I have legal work that I put in myself, Your Honor." Tr. 30 (emphasis added).

After undoubtedly trying to free himself from counsel as a means to proceed *pro se*, Mr. Larkins reasserted his efforts in alternative language:

> "[defense counsel] is being forced on me anyway. Nobody ever heard of conflict of interest, you know, between a client and a lawyer." Tr. 31 (emphasis added).

The trial court responded inattentively:

> "[Defense counsel], nonetheless, remains court-appointed to represent the interest of Mr. Larkins in this proceeding." Tr. 31.

Mr. Larkins then made over a dozen more references to his legal work while incessantly remarking on the trial court's failure to pay him respect.[12]

[12] For example, some of these remarks by Mr. Larkins were "nobody will give me respect," Tr. 32; "no one will listen to me," Tr. 33; "all I'm asking for is respect," Tr. 33; "I have

The requests made in this case are indistinguishable from other requests which have been found adequate to invoke the right to proceed *pro se*. See Chapman v. United States, 553 F.2d 886, 889 (5th Cir. 1977) ("I would rather not have the gentleman with me, Your Honor. I would rather handle it myself and let it go"); Scott v. Wainwright, 617 F.2d 99 (5th Cir. 1980); Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982) (*en banc*); People v. Anderson, 247 N.W.2d 857, 860-861 (Mich. 1976).

However, this case turns on the trial court's refusal to even recognize Mr. Larkins' constitutional right of self-representation, thereby not even approaching a Faretta inquiry. Yet, Mr. Larkins' repeated assertions that defense counsel did not represent him and his constant references to his legal work amounted to a tantamount assertion of his constitutional right to self-representation. This Court has repeatedly noted that when a defendant:

> [a]ttempts to dismiss his court-appointed counsel, it is presumed that he is exercising his right to self-representation. However, it nevertheless is incumbent upon the court to determine whether the accused is knowingly and intelligently waiving his right to court appointed counsel, and the court commits reversible error if it fails to do so.

State v. Young, 626 So. 2d 655, 657 (Fla. 1993) (emphasis added), quoting Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988). The

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legal work," Tr. 33; "you're saying that my legal work doesn't mean a thing," Tr. 34; "I done my own appeal briefs," Tr. 35.

Young Court further expounded upon a defendant's exercise of his constitutional right to self-representation by holding that "the trial judge may presume that the defendant's actions constitute a request to proceed *pro se* and may then confirm the waiver of assistance of counsel through a Faretta inquiry." Id. at 657.

In Rios v. State, 696 So. 2d 469 (Fla. 2d DCA 1997), the appellate court reversed the defendant's conviction based upon the trial court's failure to inquire about his desire to change attorneys.[13] In so holding, the Second District Court of Appeal reasoned that "if court appointed counsel is found to be rendering effective assistance and the defendant insists that he still wants to discharge him or her, a Faretta hearing is in order." Id. at 471 (footnote omitted).

Like the circumstances in Rios, the trial court here failed to adequately inquire as to why Mr. Larkins continuously stated that defense counsel did not represent him. The trial court simply asked whether Mr. Larkins was represented by defense counsel. Even after this cursory questioning, Mr. Larkins continued to declare that defense counsel was not representing him and perpetually

[13] The Second District Court of Appeal held that once the defendant alleges that defense counsel is ineffective, the trial court must inquire into this matter first. Only after this inquiry into the effectiveness of defense counsel does the trial court inquire into whether the defendant wishes to represent himself. Rios, 696 So. 2d at 471. (Mr. Larkins is not now raising an ineffective assistance of counsel claim but, instead, only notes the trial court's absolute failure to conduct the appropriate inquiry.)

referred to his legal work.

Therefore, because Mr. Larkins exercised his right to proceed *pro se* and the trial court failed to conduct a Faretta inquiry, Mr. Larkins' Sixth Amendment right to self-representation was violated, thereby mandating that this Court remand for re-sentencing allowing Mr. Larkins the opportunity to represent himself.

III. MR. LARKINS' DEATH SENTENCE IS DISPROPORTIONATE IN LIGHT OF THE LONG LIST OF COMPELLING MENTAL MITIGATION AND THE CLEAR EVIDENCE THAT THE CRIME ALLEGED AGAINST HIM WAS A SPONTANEOUS ACT WITH NO PREMEDITATION.

Mr. Larkins' death sentence is disproportionate to other similar cases and, thus, his sentence must be commuted to Life Imprisonment. In addressing proportionality, this Court has held that:

> Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different. . . . "Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes."

Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988), quoting State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973). The Fitzpatrick Court further reasoned that "[a] high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Id. at 811.

The imposition of a Life Sentence for Mr. Larkins necessarily coincides with the evenhandedness with which Florida courts must administer the death sentence. See Gregg v. Georgia, 428 U.S. 153 (1976). Moreover, Mr. Larkins' crime is anything but "the least mitigated." Fitzpatrick, 527 So. 2d at 811. The trial judge enumerated two statutory mental mitigating circumstances and eight non-statutory mental and emotional mitigating circumstances as well as two non-statutory mitigating circumstances pertaining to the crime itself.[14] R. 23-25. Lastly, the trial judge included as a non-statutory mitigating circumstance that Mr. Larkins' prior felony conviction was for manslaughter and not murder, reducing the weight that should be given the 'prior felony conviction' aggravating factor. R. 24. See Terry v. State, 668 So. 2d 954, 965-966 (Fla. 1996) (holding that the 'prior felony conviction' aggravating circumstance carried less weight where this Court relied upon extenuating factors).

In Fitzpatrick, supra, this Court determined that the defendant's death sentence was inappropriate and instead imposed a life sentence where the two aggravating circumstances were a prior violent felony and murder committed during the course of an armed robbery and the mitigation consisted of the defendant's age, his marginal intelligence, and abusive childhood. In addition to the

[14] These listed mitigating factors do not include Mr. Larkins' organic brain disorder which should have been considered as a separate and distinguishable mitigating circumstance.

overwhelming similarities between the facts surrounding the crimes themselves and the aggravating circumstances, the defendants' mitigating circumstances bear remarkable parallels. Both defendants' intellectual capabilities were substantially bellow average, both defendants had a history of drug use, and both defendants experienced significant emotional problems. Even more compelling is that Mr. Larkins' mental and emotional mitigating circumstances exceed Fitzpatrick by the trial judge's finding of two statutory mitigating circumstances (not found in Fitzpatrick), Mr. Larkins' organic brain disorder, Mr. Larkins' lowest one percentile ranking in memory, Mr. Larkins' chronic mental problems, and the offense's result of Mr. Larkins' impulsivity and irritability stemming from his brain damage. Therefore, Mr. Larkins' death sentence is disproportional as Fitzpatrick's death sentence was not merited by its compelling mitigation.

Likewise, in Terry v. State, 668 So. 2d 954, 966 (Fla. 1996), this Court again ruled as disproportional a case with the same aggravating circumstances but significantly less mitigation. After affirming the two statutory aggravating factors, the Terry Court reduced their weight in concluding that the murder was perhaps a "robbery gone bad" and the 'previous felony conviction' was for a contemporaneous crime. Id. at 965-966. The murder occurred during an armed robbery of a gas station. Although the Terry Court conceded that "there is not a great deal of mitigation in this

case," this Court listed four mitigating circumstances proffered by the defense at trial: "(1) emotional and developmental deprivation in adolescence; (2) poverty; (3) good family man; and (4) circumstances of the crimes did not set this murder apart from the norm of other murders." Id. at 957-958.

As this Court found in Terry, the aggravating factors in this case are also lessened by the trial court's findings. First, the trial court ruled as a non-statutory mitigating circumstance that Mr. Larkins' prior felony conviction was for manslaughter and not murder. R.24. Second, there is every indication that this crime was also a "robbery gone bad." The trial court further evidenced this crime's "robbery gone bad" characteristic in its findings of both mental statutory and non-statutory mitigating circumstances, namely, that "the offense was the result of impulsivity and irritability." R.25. The cashier's inability to open the register and the child's crying in the convenience store are both instances which incited Mr. Larkins' mental deficiencies, creating an environment whereby Mr. Larkins no longer could "conform his conduct to the requirements of law." R.24.

Lastly, and even more compelling than Terry is Mr. Larkins' mitigation. Where Terry had only four vague non-statutory mitigating circumstances, Larkins' mitigation runs the entire spectrum of mental and emotional infirmities, establishes a history of drug and alcohol problems, and includes conditions directly

undermining the aggravating circumstances. Therefore, because Terry supports disproportionality and Larkins' mitigation eclipses it, Larkins deserves a commutated sentence of Life Imprisonment.

This Court has also held the death penalty disproportionate in cases involving just two aggravating circumstances similar to Mr. Larkins and with significantly weaker mental mitigation. See, e.g., Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997) (ruling that the imposition of the death sentence was disproportional, although the aggravating circumstances of 'murder committed during burglary' and the 'murder was heinous, atrocious, or cruel' existed, because of the mitigation of defendant's age, drug use, deprived childhood, history of mental illness, borderline intelligence, and crime may have been unplanned); Krammer v. State, 619 So. 2d 274, 277-278 (Fla. 1993) (holding that the defendant's death sentence was disproportionate, although the aggravating factors of 'prior conviction of a violent felony' and 'heinous, atrocious, or cruel' existed, because of the mitigation of the defendant's history of alcoholism, mental stress, severe loss of emotional control, and potential for adaption to prison life).

This Court has also held the death sentence to be disproportionate even though two aggravating factors are found. See, e.g., Farinas v. State, 569 So. 2d 425, 431 (Fla. 1990) (reasoning that the death penalty was disproportional, although finding that the aggravating circumstances of 'murder committed

while defendant was engaged in the commission of kidnaping' and 'especially heinous, atrocious, or cruel' existed, because the crime was committed while 'the defendant was under the influence of extreme mental or emotional disturbance' and murder resulted from a confrontation with former lover).

Lastly, this Court has held the death sentence as disproportionate in cases where the aggravating circumstance is similar to one found in this case and the mitigation pales in comparison with Mr. Larkins. See, e.g., Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) (ruling that the death penalty was disproportionate, although the aggravating circumstance of 'murder committed during the course of a robbery' was found, because of the mitigation that the defendant possessed low intelligence, experienced emotional disturbances, and raised without a father); Thompson v. State, 647 So. 2d 824 (Fla. 1994) (holding that the death sentence was disproportionate, although the aggravating circumstance of 'murder committed in the course of a robbery' existed, because of the mitigation that the defendant was a good parent, had no violent history, received an honorable discharge from the navy, maintained regular employment, raised in a church, possessed artistic skills, and was a good prisoner); Clark v. State, 609 So. 2d 513, 515-516 (Fla. 1992) (reasoning that the death sentence was disproportionate, although the aggravating circumstance that the crime was committed for pecuniary gain

existed, because of the mitigation that the defendant was a disturbed person, his judgment may have been impaired, drank alcohol on the day of the murder, and was abused as a child).

Therefore, taking all the circumstances of the crime and the offender into account, the death penalty should be vacated in this case.

IV. THE TRIAL COURT FAILED TO ACCORD THE PROPER WEIGHT TO THE OVERWHELMING MITIGATION AND MINIMAL AGGRAVATION BEFORE REIMPOSING A DEATH SENTENCE.

The trial court erred in his weighing determination when he (1) deferred discussion of mental statutory mitigation to his analysis of non-statutory mitigation and (2) failed to consider Mr. Larkins' organic brain damage as a separate non-statutory mitigating circumstance.

This Court has outlined the duties of the trial judge in determining whether mitigating circumstances exist:

> [W]e find that the trial court's first task in reaching its conclusion is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to couterbalance the aggravating factors.

Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987).

In determining exactly what weight the sentencer places on the mitigating circumstances, this Court has held:

> Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record."

Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990), quoting Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

However, the trial judge's discretion in weighing is not unfettered. Indeed, this Court has explicitly rejected "that any sentence of death . . . is clothed with a presumption of correctness and will not be reversed absent a clear abuse of discretion on the part of the sentencing judge. To do so would effectively result in this state's death penalty being declared unconstitutional." White v. State, 616 So. 2d 21, 26 (Fla. 1993). Therefore, this Court's review of the trial judge's weighing determination must still adhere to tenets of reason to ensure that the sentence is free from unconstitutional arbitrary factors. See Gregg v. Georgia, 428 U.S. 153 (1976).

A. THE TRIAL JUDGE FAILED TO APPORTION PROPER WEIGHT TO THE STATUTORY MENTAL MITIGATION BY DEFERRING DISCUSSION OF ITS IMPORTANCE TO THE NON-STATUTORY MITIGATION.

In the Sentencing Order, the trial judge found two statutory mental mitigating circumstances to exist: (1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. R. 23-24 (emphasis added). Nowhere in the trial judge's discussion of these two mitigating circumstances does he either cite a fact concerning the crime or discuss the nature of the mental mitigation.[15] Therein lies the trial judge's error in weighing, he failed to express how the mitigation affected the crime itself, how it affected Mr. Larkins, and, most importantly, how his weighing was supported by "sufficient evidence in the record." Brown, 392 So. 2d at 1331.

Although the trial judge found these statutory mental mitigating circumstances to exist, he erred by not affording them their due weight. "[A] mitigating factor once found cannot be dismissed as having no weight." Campbell, 571 So. 2d at 420.

In addressing 'the capital felony was committed while the

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[15] This failure to adequately weigh the mitigation may be attributable to either his failure to attend the *Handling Capital Cases Course,* In re Amendment to the Florida Rules of Judicial Administration, Rule 2.050(b)(10), 688 So. 2d 320 (Fla. 1997), or the over five and a half years that elapsed between the Sentencing Orders. (In fact, the trial judge himself "expressed to . . . Judge Davis my concern of the fact that so much time has elapsed." R. 55.)

defendant was under the influence of extreme mental or emotional disturbance,' the Sentencing Order reads that the clinical psychologist's "opinion was based on numerous factors which the Court will discuss in the portion of the order dealing with non-statutory mitigation." R.23. This blatantly dilutes the extent of Mr. Larkins' *extreme* mental and emotional disturbance at the *time of the crime*. The non-statutory mental mitigation applies to Mr. Larkins as a *person* whereas this statutory mental mitigation applies to the circumstances surrounding the crime itself, bearing weight upon "reducing the degree of moral culpability for the crime committed." Rogers, 511 So. 2d at 534. Moreover, the trial judge failed to note, and thus failed to weigh, the impact that "a person who suffers some sort of cerebral or brain damage will find everything more irritating."[16] O.R. 1318. Undisputed evidence established that in the course of the crime a child was screaming which set-off Mr. Larkins.[17] Failing to consider these factors, the trial judge improperly afforded the statutory mitigation the weight

[16] This quote is taken from Dr. Dee's testimony in the sentencing phase of the first trial. He testified that people with brain damage similar to Mr. Larkins' react with "impulsivity and irritability" when confronted with what normal people would perceive as normal social stimuli like children crying. O.R.1317-1318.

[17] A woman and her two children witnessed the crime, and one of the children began to cry prior to the shooting. None of them were hurt.

it demanded.[18]

B. THE TRIAL COURT FAILED TO CONSIDER MR. LARKINS' ORGANIC BRAIN DISORDER AS A SEPARATE NON-STATUTORY MITIGATING CIRCUMSTANCE, THEREBY FURTHER DEPLETING THE MITIGATION OF EVEN MORE COMPELLING MENTAL MITIGATION.

In not separately considering Mr. Larkins' organic brain disorder, the trial judge failed to consider all the mitigation and erred in re-sentencing Mr. Larkins to death. In the Sentencing Order, the trial judge mentioned Mr. Larkins' organic brain disorder only once and tucked it under a statutory mitigating circumstance, affording it insufficient, cursory mention.[19] This Court has held:

> The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established."

Campbell, 571 So. 2d at 419-420 (footnotes omitted), quoting Fla. Std. Jury Instr. (Crim.) at 81.

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[18] Both the impulsivity and irritability component of Mr. Larkins' deficient emotional state and the trial judge's suspensive discussion of the first mental mitigation equally applies to the 'capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired' mitigating circumstance.

[19] This is in stark contrast with the extent of consideration the trial judge initially dedicated to Mr. Larkins' organic brain disorder in the first Sentencing Order, finding it to be the sole mitigating circumstance. O.R. 156-157.

Here, Mr. Larkins' organic brain disorder is "mitigating in nature" and proven since Dr. Dee's testimony went undisputed.

As discussed earlier, Mr. Larkins' statutory mitigation concerns the degree of culpability of the crime itself whereas non-statutory mitigation can concern either the crime itself or the person himself. Mr. Larkins' organic brain disorder pertains to Mr. Larkins as a *person*. Indeed, Mr. Larkins' organic brain disorder permeates every facet of his life: it affected him the night of the crime; the child's crying intensified it; his lowest one-percentile in intelligence reflects it; and his difficulty in establishing meaningful relationships incorporates it.

In Livingston v. State, 565 So. 2d 1288 (Fla. 1988), this Court ruled that the defendant's death sentence was disproportionate because the non-statutory mitigating circumstances outweighed the aggravating circumstances. The facts and law of this case are eerily similar to Mr. Larkins. In February 1985, the defendant entered a "convenience store, shot the female attendant twice, fired one shot at another woman inside the store, and carried off the cash register." Id. at 1289. The trial court convicted the defendant of first degree murder and sentenced him to death based on two aggravating factors: previous conviction of a violent felony and commission of murder during the course of a robbery. Id. at 1292. However, this Court held that the non-statutory mitigating factors "effectively outweigh the remaining

aggravating circumstances." Id. This Court noted that the mitigating factors were the defendant's beatings in his childhood, his youth, marginal intellectual capability, and extensive use of illegal drugs. Id.

Like the murder in Livingston, this murder occurred during the course of robbing a convenience store wherein the defendant then carried away the cash register. The victims in both cases died from two gunshot wounds. Moreover, both crimes were deemed to include the same aggravating circumstances.[20]

Most importantly, the mitigation in Larkins is not only similar to Livingston but exceeds it. In Livingston, this Court delineated mental mitigation in the form of marginal intelligence and immaturity. The mitigation in Larkins eclipses it. In this case, the trial court found (1) two statutory mental mitigating circumstances, namely, 'the capital felony was committed while Mr. Larkins was under the influence of extreme mental or emotional disturbance,' and 'the capacity of Mr. Larkins to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired,' (2) numerous non-statutory mental and emotional mitigating circumstances, establishing a lifetime of mental dysfunction and emotional problems, i.e. (a) Mr. Larkins is a poor reader, (b) Mr. Larkins

[20] The trial judge undermined the weight given to Mr. Larkins' prior felony conviction when he included as a non-statutory mitigator that Mr. Larkins' "previous conviction was for manslaughter, not murder." R. 24.

experienced difficulty in school, (c)Mr. Larkins dropped out of school in either the fifth or sixth grade, (d) Mr. Larkins functions at the lower 20% of the population in intelligence, (e) Mr. Larkins came from a barren cultural background, (f) Mr. Larkins memory ranks in the lowest one percent of the population, (g) Mr. Larkins has chronic mental problems possibly caused by drugs and alcohol, and (h) Mr. Larkins is withdrawn and has difficulty establishing relationships,[21] and (3) two non-statutory mitigating circumstances addressing the crime itself - (a) the offense was the result of impulsivity, and (b) Mr. Larkins drank alcoholic beverages the night of the crime. R. 23-25.

Therefore, because the aggravating circumstances are the same, and Mr. Larkins' mitigation surpasses in nature and extent those found in Livingston, the trial judge erred in sentencing Mr. Larkins to death, thereby mandating that this Court sentence Mr. Larkins to Life Imprisonment.

V. IT WAS ERROR FOR THE STATE TO GO JUDGE SHOPPING AND SOLICIT A CHANGE OF JUDGES *EX PARTE* WITHOUT NOTICE TO THE DEFENSE TO THE FUNDAMENTAL DETRIMENT OF MR. LARKINS.

[21] This extensive list does not include Mr. Larkins' organic brain disorder, a non-statutory mitigating circumstance the trial judge should have considered. *See supra*.

In any criminal case--and particularly in a capital case--it is imperative that "justice satisfy the appearance of justice." In Re Murchison, 349 U.S. 133, 136 (1955), quoting Offutt v. United States, 348 U.S. 11, 14 (1955). This rule has been jealously guarded by the appellate courts, fully realizing that "this `stringent rule may sometimes bar judges who have no bias and who would do their very best to weigh the scales of justice equally between contending parties.'" Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980), quoting In Re Murchison, 349 U.S. at 136.

A. THE STATE, DISSATISFIED WITH THE IDEA OF A RESENTENCING BEFORE A NEW JUDGE, ACTIVELY SOLICITED A CHANGE TO A MORE FAVORABLE FORUM WITHOUT ANY NOTICE TO THE DEFENSE UNTIL IT WAS *FAIT ACCOMPLI*.

Mr. Larkins supplements this assignment of error with evidence adduced at the recent hearing that supports his allegations that the state hand-picked Judge Norris in an *ex parte* fashion because he was viewed as favoring the position of the prosecution.

Back on July 16, 1996, Judge David Langford who was assigned the case when Judge Norris retired, held a status conference to determine the best way to comply with the Supreme Court's order in Larkins.[22] Judge Langford decided that the mandate required a new

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1 " The Florida Supreme Court has issued a mandate in regard to that case. And the mandate directed the trial court. . . The sentencing order. . . was set aside and it was remanded to the trial court for appropriate proceedings consistent with their opinion." Tr. 42.

sentencing hearing which would include impaneling a new jury and hearing.[23] The state was very displeased with this notion and pined for Judge Norris' immediate reassignment.[24]

Judge Norris was in fact reassigned. Tr. 54. Mr. Larkins was unaware of Norris' reassignment until a month before the October 8, 1996, hearing. R.61. Mr. Larkins did not find out that the state had requested Judge Norris' assignment until the hearing itself.[25] Counsel for Mr. Larkins duly objected: "[I] would put that on the record as objecting to that as *ex parte*. . . ." Tr. 61.

Again, while the truth is as plain as the nose on one's face, the issue is the *appearance* of judge shopping. It is not Mr. Larkins' burden to prove the actual facts. But the record speaks loudly to the State's perception of Judge Norris as more favorable than Judge Langford.

It is a long settled principle that judge shopping will not be

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[23] "[I]t appears to me what we are going to have to do is set a new sentencing hearing in regard to this. . . whenever I say a new sentencing hearing, it appears to me we're going to have to impanel a new jury to make a recommendation in regard to this. . . ." Tr. 42.

[24] The Assistant District Attorney stated that "the State's position has always been in this matter that Judge Norris should rectify this matter . . . it's always been, and still, the State's position that Judge Norris should be the sentencing judge at this stage." Tr. 46.

[25] Defense counsel stated that "about four weeks ago I was informed that your honor had been reassigned the case. I believe today's the first time I knew that the State Attorney had had contact with your Honor about that reassignment." Tr. 61.

tolerated. See Telford v. Telford, 225 So. 2d 165 (Fla. 2d DCA 1969) "Judge shopping will not be condoned in the courts of this state." The fact that the judge shopping in this case was done *ex parte* only darkens the already black waters in Mr. Larkins' fountain of hope.

Kruckenberg v. Powell, 422 So. 2d 994 (Fla. 5th Dist. 1982) is the only Florida case that addresses the issue of the state *ex parte* judge shopping. In Kruckenberg, the Fifth District dismissed the petitioner's writ. The court ruled that litigants have no standing to enforce internal court policy. Id. at 995.

Under no stretch of the bounds of justice can the state be allowed to find a judge to impose the sentence that they wish. In this case, the State Attorney's office actively solicited the trial court's reassignment because of his previous predilection of sentencing Mr. Larkins to death. Such manipulation of judge assignment must not be allowed. This court has the authority to right such egregious wrongs and Mr. Larkins urges it to do so.

B. THE TRIAL COURT SHOULD NOT HAVE BEEN SEATED ON THE CASE WITHOUT ANY RECENT TRAINING IN THE PROPER CONDUCT OF A CAPITAL CASE.

The trial judge who presided over Mr. Larkins capital trial did not meet the minimum requirements of Florida Rule of Judicial

Administration 2.050(b)(10) at the time of the trial.[26] As a result, Mr. Larkins did not receive a proper sentencing hearing and therefore justice requires that he receive a new one.

On October 16, 1991, Judge William Norris improperly sentenced Robert Mr. Larkins to death. R. 1. On January 1, 1995, Judge Norris stepped down from the bench and, in the face of heavy oncoming traffic, retired to New York. Tr. 55. On May 11, 1995, this Court recognized the trial court's error and vacated the death penalty. State v. Larkins, 655 So.2d 95, 101 (Fla. 1995). This Court's judgment called for a "remand with instructions for a new sentencing by the court in accord with this opinion." Id.

Judge David Langford was assigned the case and interpreted Larkins to mean that the defendant was entitled to a new sentencing hearing.R.44 On July 16, 1996, at a status conference, the state objected to a completely new hearing.. After the conference, The state attorney's office wrote to Judge Norris, in New York, and asked him to return to Florida and re-sentence Robert Larkins. Tr. 55. Judge Norris returned to Florida and held a motion hearing October 8, 1996. In February 1997, the Florida Supreme Court laid down specific guidelines for judges who preside in capital cases. Fla. R. Jud. Admin. Rule 2.050(b)(10). The rule was later amended

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[26] Judge William Norris, who retired on January 1, 1995, presided over the 1993 trial. Judge Norris returned for this matter and presided over the re-sentencing in 1997.

after comments from practitioners.[27]

Defense counsel, realizing that the trial court was not in comportment with the new rules, filed a Motion To Disqualify Judge Pursuant To Fl.R.Jud.Admin. 2.050(b)(10). Judge Norris denied the motion. Eleven days later, on May 30, 1997, Judge Norris, for the second time, sentenced Robert Larkins to death.

The purpose of the rule, adopted by the Supreme Court of Florida, is to insure that trial judges assigned to capital cases have received the most current understanding of the ever elusive "right answer" on how to properly weigh aggravating circumstances with both statutory and non-statutory mitigating circumstances. Rule 2.050(b)(10) reads:

> The chief judge shall ensure that no judge presides over a capital case in which the state is seeking the death penalty or collateral proceedings brought by a death row inmate until the judge has served a minimum of six months in a felony criminal division and successfully completed the " Handling Capital Cases" course offered through the Florida College of Advanced Judicial Studies within the last five years. The Chief Justice may waive this

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[27] In November 1997, this court amended the rule so that judges who presided over one stage of the proceeding would not be barred from presiding over collateral stages. This amendment does not affect the position of Mr. Larkins: The Florida Supreme Court recognizes the need for judges who preside over capital cases to be familiar with the most current cases and issues involving the death penalty. The judge who sentences Mr. Larkins needs to be so informed. The trial court has not completed the required continuing education and therefore is not in the pool of jurists who are up to speed in current capital sentencing factors. Justice requires a new judge, who is in full comportment with the spirit and the letter of the capital rule, sentence Mr. Larkins.

requirement in exceptional circumstances at the request of the chief judge.

The Rule sets out two requirements and an "exceptional circumstances" provision. The requirements for capital assignment are: (1) the judge must have presided over felony trials for at least six months and (2) the judge must have completed the "Handling Capital Cases" course offered by the trial college within the last five years.

The "exceptional circumstances" provision states that the chief justice of the Florida Supreme Court can waive these requirements if the chief (assigning) district judge makes such a request.

Both requirements must be met and the "exceptional circumstances" provision not exercised in order for a judge to be legally able to sentence a defendant accused of a capital crime.

In this case, there is no "exceptional circumstances" provision issue since the Chief Judge of this circuit never petitioned the Supreme Court for a waiver of the rule.[28] Also,

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[28] Although Judge Norris mentions on the record that he was reassigned the case, it is unclear from the record whether (a) the Chief Judge explicitly requested reassignment pursuant to the two requirements of §2.050(b)(10), (b)after satisfying the "exceptional circumstances" provision, (c) pursuant to this Court's order directing the remand, or (d) at the request of the State Attorney's Office. R.55. Nonetheless, nowhere in the record, is there evidence that the Chief Judge of the circuit ever requested a waiver from the Chief Justice as required by § 2.050 (b)(10).

there is no issue here about Judge Norris' tenure on the bench.[29] At issue here, is the fact that Judge Norris has never completed the "Handling Capital Cases" course and is therefore not in comportment with the Florida law and should not have been allowed to sentence Mr. Larkins.

Florida rule 2.050(b)(10) provides an absolute bar for death sentences from judges who have not met the two minimum requirements. The rule applies here.

The trial court concedes the fact that he has not completed the "Handling Capital Cases" course as required by the rule. R. 21. The court refused recusal because it claimed: (1) the Supreme Court only mandated the trial court consider mitigating evidence and (2) the rule is only administrative. Id.

The "Handling Capital Cases" course is taught by some of the most well respected judges in Florida. The course is a three day annual affair that gives judges from throughout the state an opportunity to exchange ideas on many complex issues involving capital trials. The course allows each jurist to interact with each other and compare their own experiences so that each judge can take back to the bench a new and current perspective of the law. These discussions are especially important in areas involving the defendant's mental health because the medical community is

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[29] Judge Norris retired on January 1, 1995. Mr. Larkins does not dispute that the trial court has fulfilled the six month requirement.

understanding more and more about the human mind everyday.

It is easy to see how a judge charged with the highest burden of deciding if a defendant lives or dies would benefit from the experience of exchanging thoughts with similarly situated colleagues. Judge Stanford Blake, a lecturer at the 1997 course, writes that his materials are partially borrowed from another judge "while reflecting current changes in the law." Handling Capital Cases coursebook 1997. From the introduction, Judge Blake's language connotes a substantive requirement to Rule 2.050(b)(10).

This Court, in its wisdom, provided a substantive element in this rule by requiring the capital judges "successfully complete . . . [the course] . . . within the last five years." Fl. R. Jud. Admin. 2.050(b)(10). The 'within the last five years' requirement means nothing if it doesn't mean that it is important for all trial judges who preside over capital cases to be up to speed on the latest cases, procedures, rulings, and issues of capital litigation here in Florida. In keeping with the spirit of the rule, there are both procedural and substantive requirements to rule 2.050 that mandate adherence, insuring the fair administration of justice. In this case, the rule was not followed and, as a result, justice eluded Mr. Larkins.

In this case, Judge Norris has not had the benefit of these discussions and neither has he kept up with the current issues involving the defendant's mental health. In fact, Judge Norris did

not look at the cold record for a *five and one half year period.* (R.54)

The remaining consideration is whether the rule applies to Mr. Larkins. It does. Mr. Larkins was convicted and originally sentenced in 1991. In 1995 the Supreme Court of Florida vacated the sentence. Fla. R. Jud. Admin. 2.050(b)(10) became effective March 31,1997. Judge Norris, who had not met the new rules requirements, sentenced Mr. Larkins to death on May 30, 1997.

Fl. R. Jud. Admin. 2.050(b)(10) applies to Mr. Larkins the same way Campbell, 571 So. 2d at 415 applied to Michael Crump. Crump v. State, 654 So. 2d 545 (Fla. 1993). Michael Crump was convicted of first degree murder and sentenced to death in 1989. Id. Campbell was decided in 1990. The Supreme Court vacated the death sentence in 1993. Crump, 622 So. 2d at 963. On remand, the trial court resentenced Crump to death. The Florida Supreme Court vacated that sentence for Campbell violations. Id. at 545. The Crump court explained that "[a]lthough we had not decided Campbell when Crump was originally sentenced in 1989, Campbell was decided in 1990 and applied to Crump's case on remand." Id. at 546 n.4. Similarly, even though Fla. R. Jud. Admin. 2.050(b)(10) was not enacted until 1997, six years after Robert Larkins was originally sentenced, the rule applied to Mr. Larkins on remand.

In conclusion, Fl. R. Jud. Admin. 2.050(b)(10) applied to Mr. Larkins' re-sentencing. The rule has both procedural and

substantive components. The trial court judge who sentenced Mr. Larkins to death in May 1997 did not meet the minimum requirements as set out in the rule.

Further, the failure of the judge to avail himself of the judicial course "Handling Capital Cases" harmed Mr. Larkins because the court, who had not reviewed the evidence in five and a half years, is not current on the very important mental health issues that have to be weighed in order to reach a just sentence. Mr. Larkins prays for a new re-sentencing hearing presided over by a judge who meets the minimum requirements set out by the Supreme Court. In this way, Mr. Larkins can be assured that the mental health issues presented in his case will be given their proper weight.

SUMMARY OF THE ARGUMENT

In its order reimposing the death penalty in the Appellant the trial court was in error in several ways.

First, the trial court failed to fulfill its obligation to resolve the issue of the Appellants competence to proceed with a new sentencing procedure prior to reimposing the death penalty.

The trial court clearly found that there was a basis to doubt the Appellant's competence when the trial court ordered that he be evaluated.

Moreover the circumstance surrounding the re-sentencing created a reasonable ground to believe that the Appellant was incompetent to proceed.

Secondly assuming that the trial court found Mr. Larkins competent and to proceed and to make the decision the trial court must be reversed for failing to respect his layman's request to proceed Pro Se and to hold a Farette hearing.

Thirdly, Mr. Larkins' death sentence is disproportionate in light of the long list of compelling mental mitigation and the clear evidence that the crime alleged against him was a spontaneous act with no premeditation.

Fourthly, the trial court failed to accord the proper weight to the overwhelming mitigation and minimal aggravation before

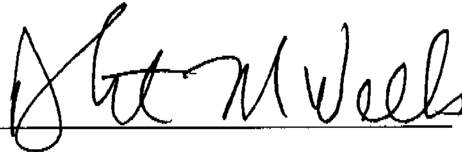
reimposing a death sentence.

Fifthly, it was error for the state to go judge shopping and solicit a change of judges ex parte without notice to the defense to the fundamental detriment or Mr. Larkins.

CONCLUSION

Based on the foregoing argument and citation of authorities, Appellant respectfully requests that the trial court's Order sentencing the Appellant to death be reversed and this court should remand the case back to the trial court so that a determination of the Appellant's competency can be completed or in the alternative order the trial court to sentence the Appellant to a life sentence.

Respectfully Submitted,



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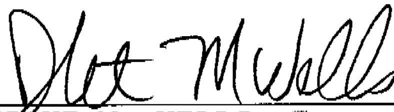
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing as been furnished by first-class mail to the Honorable Robert Butterworth, Attorney General for the State of Florida, Department of Legal Affairs, Capital Division, 2002 N. Lois Avenue, 7th Floor, Tampa, Florida 33607 on this 22nd day of April, 1998.



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