IN THE SUPREME COURT OF FLORIDA

MICHAEL ROBINSON,)
)
Appellant,)
)
vs.) CASE NUMBER 91,317
)
STATE OF FLORIDA,)
)
Appellee.)
)

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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OTHER AUTHORITIES CITED:

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_____)

ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA WHERE APPELLANT ORIGINALLY PLED GUILTY AND ASKED TO DIE, BUT ON REMAND DECIDED HE WANTED TO LIVE AFTER ALL, RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 9, 16, 17, AND 21 OF THE FLORIDA CONSTITUTION.

The state does an excellent job analyzing Robinson's eagerness to plead guilty to his girlfriend's murder in 1995. In doing so, the state misses the proverbial forest for the trees. Michael Robinson pleaded guilty in 1995 for a variety of reasons. First and foremost was his desire to be sentenced to death. He was racked with guilt, his mind was still clouded with drugs. Although he was examined by a mental health professionals, Robinson's goal, at that time, was to hide his depression and mental infirmities, so that he could achieve his suicidal objective.[1]

The state claims that the trial court clearly considered the motion to withdraw the plea on the merits. The state submits that Gunn v. State, 843 So.2d 677 (Fla. 4th DCA 1994) is inapposite, contending that the trial court did not summarily deny the motion without allowing Robinson an opportunity to allege sufficient grounds for the motion.

Appellant never argued that Robinson's trial court was quite so abrupt as the Gunn trial court. However, the transcript of the proceedings below does

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[1] Indeed, the mental health professionals relied upon Robinson's denials of symptoms of mental disturbance in reaching their conclusions that he was competent to proceed. See, e.g. Dr. Berland's report (Appendix A, to Answer Brief at 2) ["...Additionally, he denied recent substance abuse or the symptoms of mental disturbance..."]

reveal the **summary nature** of the denial of the motion to withdraw the plea. Ultimately, Robinson clarified, to some extent, the grounds which he (a lay person) thought justified the motion to withdraw his plea. After the penalty phase ended, Robinson admitted that his:

> mind has cleared up a lot since then....I've been drug free for almost three years now....they give me drug tests randomly....(RA 233, Vol. II) ...I wanted to withdraw the plea. You have denied that already. I gave that plea, again, I didn't want to give any chance of any other outcome happening except the death penalty...the drug stuff I was going through that the doctors talked about, the reason I wanted to withdraw my plea was because I was under extreme duress...the depression of the fact that I killed my girlfriend. **I wanted to die**. I can't commit suicide because of my religion....

(RA 235-37, Vol. II)(Emphasis added.)

The testimony of Dr. Lipman, a neuropharmacologist, supports Robinson's statements to the judge. Dr. Lipman testified that a person who has "experienced the drug [cocaine] chronically...that psychosis does not immediately go away when the drug leaves the system. It persists sometimes for weeks and months....**in some people it can be permanent**...The psychosis is joined by a truly crippling depression and this is an organic depression...caused

actually by the absence of the drug." (RA 130, Vol. II)(Emphasis added.) Additionally, both Dr. Upson and Dr. Lipman concluded that Michael Robinson's brain had some type of damage. (RA 63, 142, 149-50, Vol. II)

Contrary to the state's assertion, appellant is not seeking to carve out an "extreme remorse" exception to the rules relating to the voluntary entry of guilty pleas. Rather, appellant contends that the trial court's summary denial of his motion to withdraw his plea prevented him from establishing the **complete** grounds for his motion. Specifically, Robinson could have proven that, as a result of killing one of the few people who truly loved him, Robinson was clinically depressed. As a result of extreme remorse, clinical depression, probable brain damage, his fear of prison rape, and drug-induced psychosis, Robinson suffered from duress such that he was **compelled** to plead guilty in his successful quest for his own death sentence. As a result, he skewed the facts and circumstances of the murder such that the entire procedure was infected with untruths and uncertainty. Since the reliability of the determination of Robinson's actual culpability is now clearly called into question, he should have been allowed to withdraw his plea.

An accurate assessment of the facts of this case very well may have revealed a killing without the requisite premeditation to support a first-degree

murder conviction. These facts could easily support a lesser crime, perhaps second-degree murder or one of even less culpability. "....The law inclines toward a trial on the merits...". Yesnes v. State, 440 So.2d 628, 634 (Fla. 1st DCA 1983). The trial court abused its discretion in denying Robinson's motion to withdraw his plea. At the very least, the trial court erred in summarily denying the motion without allowing further development to determine if sufficient grounds existed to withdraw the plea.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEUROLOGICAL TESTING WHICH WOULD HAVE PROVIDED MORE ACCURATE AND COMPLETE DATA ABOUT THE APPELLANT'S ORGANIC BRAIN DAMAGE, ENABLING THE DEFENSE EXPERTS TO REBUT AGGRAVATING CIRCUMSTANCES AND ESTABLISH MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE VIOLATIVE OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2, 9, 16, 17, AND 21 OF THE FLORIDA CONSTITUTION.

Contrary to the state's assertion, appellant did not "first" mention his desire to have a SPECT scan performed on June 5, 1997. Actually, appellant filed a motion requesting a brain scan on May 23, 1997. Additionally, appellant disputes the state's allegation that, "Robinson did not follow through and obtain a ruling on the scan at the June 5th hearing." Answer Brief, p.36. At the June 5, 1998 hearing, defense counsel explained to the trial court that a $500.00 PET scan would determine brain injury. (RA 102-103, SR Vol. VI) The trial court initially agreed that the requested test was a reasonable expense.

> THE COURT: I can see getting the $500.00 test done. I can see that because that's something tangible, something I can understand maybe and that's reasonable. And if that's what you have to

do for today, I think that's fair.

(RA 110, SR Vol. VI) Near the end of the hearing, the trial court agreed to expend county funds to pay for the test.

> MR. BENDER (Defense Counsel): ...and the $500.00 on the PET scan, can we agree on that?
>
> THE COURT: Yes.

(RA 112, SR Vol. VI) As this Court can see, the trial court clearly ruled on June 5, 1998 that appellant could have his PET scan at county expense. Subsequently, the trial court declined to issue an order for the test. Although the state raised a Frye[2] objection, the trial court's clear concern was the possibility of a delay. This concern was manifest despite the fact that the test was scheduled a full ten days before the commencement of the penalty phase. Although the scientific acceptance of the test was argued by the state and mentioned by the trial court, the defense was never given an opportunity to establish the admissibility of the test. Indeed, the trial court never conducted a Frye hearing, *per se*, so this was clearly not the basis for canceling the test. Rather, the trial court perceived a problem with time and money. "Enough is enough" and there would be no more delays nor expenditure of county funds.

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[2] Frye v. United States, 293 F.1013 (D.C. Cir. 1923).

The state's primary contention in the Answer Brief is that a SPECT scan, while perhaps helpful, was not necessary in this case. Specifically, the state points out that a SPECT scan is not nearly as detailed and precise as a PET scan which was the test at issue in Hoskins v. State, 702 So.2d 202 (Fla. 1997). It is clear from the record that defense counsel would have welcomed a PET scan rather than a SPECT scan. Indeed, appellant's written motion in May specified a Positron Emission Tomography (PET) scan. (R 299-301, Vol. IV) However, defense counsel orally amended his motion asking for a SPECT scan which cost only $500.00 as opposed to a PET scan which defense counsel claimed to cost $20,000.00.[3] (RA 52-53, SR Vol. IV) Defense counsel knew that this particular trial judge would never approve an expenditure of an additional $20,000.00 in this case. If the assistant attorney general is serious about the inadequacy of a SPECT scan, this Court should reverse and remand with instructions to expend county funds for the more detailed and necessary PET scan.

Additionally, the assistant attorney general falls into the same trap as the prosecutor and trial court below. The state writes in their answer brief, "...any

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[3] Actually, according to Randy Moore (trial counsel in Hoskins v. State, 702 So.2d 202 (Fla. 1997), the standard fee for a PET scan at Jacksonville Memorial Hospital is approximately $2,700.00 including interpretation. [January 20, 1998 telephone conversation between Moore and undersigned counsel.]

brain damage Robinson has is not such as to excuse or significantly mitigate his conduct in murdering Jane Sylvia." Answer Brief, p. 42. A capital defendant in a penalty phase need not show that his documented brain damage "caused" or "somehow contributed to" the murder. Appellant submits that **brain damage is a significant mitigating circumstance in determining whether an individual should face execution or life in prison without parole.** Brain damage, like a deprived and abusive childhood, is important evidence that mitigates against the imposition of the ultimate sanction that the state of Florida may exact. See, e.g., Campbell v. State, 571 So.2d 415 (Fla. 1990).

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT ROBINSON'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE TRIAL COURT HAD PREJUDGED THE CASE AS EVIDENCED BY HER REPEATED COMMENTS ON THE RECORD, AS WELL AS THE DENIAL OF ADDITIONAL FUNDS FOR MITIGATION INVESTIGATION WHICH ALSO RESULTED IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE EQUAL PROTECTION CLAUSE GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

The state has obviously reached a different conclusion, but appellant maintains that a close reading of the entire record reveals an unmistakable bias on the part of the trial judge. Appellant invites this Honorable Court to read the entire transcripts and decide for itself.

The state submits that the trial court was justifiably concerned with the delay in the proceedings because of this Court's opinion which ordered the proceedings to occur within ninety days of finality. Robinson v. State, 684 So.2d 175 (Fla. 1996). Undersigned counsel has noticed a trend by this Court to include a time frame for new proceedings upon reversal. See, e.g., Jordan v. State, 694 So.2d 708, 717 (Fla. 1997) [new penalty phase ordered within 120 days of the decision becoming final]. Appellant points out that Robinson's trial lawyers were able to seek and obtain (with relative ease) two extensions from this Court. Surely

this Court would have allowed additional time if necessary to protect appellant's constitutional rights. Under the circumstances, the trial court's perception of enormous time constraints was unwarranted to say the least. However, appellant takes this opportunity to point out the difficulties caused by orders of this nature.

The additional time was clearly necessary where Robinson did not initially cooperate with his lawyers in allowing them to develop mitigation and investigate his background. On remand, Robinson allowed the process to proceed as it should have the first time. This created severe problems as revealed by the testimony of the mitigation specialist who was forced to complete investigation and the development of mitigation in a very short period of time as opposed to the normal period of six months to a year. (RA 88-89, SR Vol. VI)

The state maintains that, with the possible exception of the SPECT scan, the defense got all that he asked for in terms of experts and money to pay them. While this may be true,[4] the record clearly reveals that defense counsel was pulling teeth to get what he wanted. He compromised and backed down repeatedly when confronted by the trial court. For example, appellant abandoned his request for a PET scan, seeking the more economical SPECT scan which the

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[4] Appellant will not concede that he got **all** the funds requested to pay the mitigation specialist.

trial court nevertheless ultimately denied. Appellant did not get "more from Judge Russell" that any other Orange County judge was willing to award." Answer Brief, p.48. The prosecutor himself conceded that Judge Kaney (from Osceola County, not Orange County but the Ninth Circuit nevertheless) allowed the test in the case of Jeremy Skocz. (RA 55, SR Vol. IV) At any rate, this is just one indication of the trial court's prejudgment of the case. Michael Robinson's death sentence, at the very least, constitutional suspect.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE DEATH SENTENCE IS NOT WARRANTED AND IS DISPROPORTIONATE IN THIS CASE.

The state argues that, contrary to appellant's assertion in the initial brief, there is no "unrefuted proof" that both statutory mental mitigators are present in this case. Answer Brief, p.57. The state also submits that the trial court **did not** find either statutory mitigating circumstance and was justified in that rejection. Answer Brief, p. 57-59. Appellant maintains that the trial court found (however in artfully) that the evidence established **both** statutory mitigating circumstances.

The trial court first addresses whether the crime was committed while Robinson was under the influence of extreme mental or emotional disturbance. (RA 343-46, Vol. IV) After addressing some of the evidence, the trial court concludes, "he may have suffered from some mental and/or emotional disturbance. This mitigator is given some weight." (RA 345-46, Vol. IV) The trial court then addresses Robinson's capacity to appreciate the criminality of his conduct or to perform his conduct to the requirements of the law. (RA 346 Vol. IV) The trial court cites Dr. Lipman's and Dr. Upson's (the only mental health witnesses) testimony that, although Robinson knew that he was doing wrong, his ability to control his actions **was substantially impaired**. Id. (Emphasis added)

The trial court concludes, "Although he said he was not able to conform his conduct to the requirements of the law, it's difficult to see why except he was overcome by his addiction to drugs...From that standpoint, **this mitigator was given great weight.**" Id. (Emphasis added.) Under these circumstances, appellant cannot reach the same conclusion as the assistant attorney general regarding the trial court's findings as to these two statutory mitigating factors.

Additionally, the record clearly reflects unrefuted evidence of these mitigating circumstances. Dr. Upson testified that Robinson met the criteria for both. (RA 75-78, Vol. II) The state seems to accept that Dr. Upson concluded that Robinson's capacity to conform his conduct to the requirements of the law was impaired, just not substantially impaired. Answer Brief, p.5 When confronted with the direct question on this issue, i.e. mere impairment or substantial impairment, Dr. Upson responded:

> The word "substantially" is difficult to deal with. I definitely think it was impaired. I think he knew what he was doing, but **I don't think he could stop himself from doing it. Emotionally and motivationally, he had no control.**

(RA 77, Vol. II) (Emphasis added.) Appellant believes that the record is clear that if a defendant "could not stop himself" the threshold level of "substantial" impairment had been met. Similarly, when asked directly about the other mental

mitigating factor, Dr. Upson replied, "In my opinion, he was under extreme emotional stress. (RA 75, Vol. II) Likewise, Dr. Lipman (as cited in the state's answer brief at page 10) concluded that Robinson's ability to conform his conduct to the requirements of the law "was substantially impaired..." (RA 161, Vol. II) Additionally, although not mentioned by the trial court, Dr. Berland's report indicated "chronic psychotic disturbance...also evidence of significant, bilateral cerebral cortical impairment...". Appendix A of Answer Brief, pp. 1-2.

Even though Robinson initially claimed that he had not used drugs on the night of the murder until after commission of the crime, Dr. Lipman provided unrefuted testimony that a person who has chronically used cocaine for a long period of time (which Robinson clearly had) can experience psychosis even when the drug leaves the system. This may persist sometimes for weeks and months, and in some people can be permanent. (RA 130, Vol. II)

Appellant also takes issue with the state's claim that Robinson did not even assert that he was "so brain damaged" that it caused him to murder Jane. Answer Brief, p.57 It is difficult to prove brain damage where the state will not allow a capital defendant access to the necessary tests to prove brain damage.

Finally, appellant strongly objects to the state arguing now, for the first time on appeal, that the facts of the case clearly show that the murder was heinous,

atrocious, and cruel. Answer Brief, p.54 The evidence clearly **did not** support a finding of this particular aggravating factor. The state did not even seek this particular factor at the trial level. A proper weighing of the appropriate aggravating factors balance against the plethora of valid mitigating circumstances must result in a proportionate sentence of life imprisonment without any possibility of parole.

POINTS V,VI,VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THESE THREE ISSUES ARE PROPERLY BEFORE THIS HONORABLE COURT.

The state contends that this Honorable Court decided these three issues adversely to the appellant in the first opinion issued in this case. Robinson v. State, 684 So.2d 175 (Fla. 1996) In a footnote, this Court "disposed" of these issues by stating:

> Although we decline to specifically address appellant's four remaining claims of error because his first claim is dispositive of the case, we find that they are without merit.

Robinson v. State, 684 So.2d at 180 n.1,6. The state basically argues, as they did at the trial level, that this Court's "rejection" of these issues is now the law of the case.

These three issues are properly before this Court. The summary treatment of these issues by this Court in the prior opinion cannot be dispositive. This Court has previously held that it has jurisdiction, based on interests of justice, substantive due process requirements, and the constitutional statutory scheme of death penalty review, to reconsider and correct erroneousness rulings, notwithstanding that such rulings may have become "law of the case." This

Court may exercise this jurisdiction in exceptional circumstances where reliance on the previous decision would result in manifest in justice. Preston v. State, 444 So.2d 939 (Fla. 1984). Additionally, this Court has held that a trial court's determination at an original sentencing proceeding regarding an aggravating circumstance is not necessarily binding in a subsequent sentencing proceeding. Preston v. State, 607 So.2d 404 (Fla. 1992) ["clean slate" rule applies to new sentencing hearings.] See also Huff v. State, 495 So.2d 145 (Fla. 1986) and Mills v. State, 24 Fla. L.Weekly D112 (Fla. 4th DCA December 30, 1998) [Defendant entitled to a *de novo* sentencing hearing on reversal of an illegal sentence.]

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Court to grant the following relief:

As to Point I, vacate Robinson's death sentence and remand with instructions to allow Robinson to withdraw his guilty plea;

As to Point II, vacate Robinson's death sentence and remand for the imposition of a life sentence without parole or, in the alternative, for a new penalty phase where the results of a brain scan are considered;

As to Point III, vacate Robinson's death sentence and remand for the imposition of a life sentence without parole or, in the alternative, remand for a new penalty phase before a different judge;

As to Points IV, V, VI, and VII, vacate Robinson's death sentence and remand for the imposition of a life sentence without parole.

Respectfully submitted,
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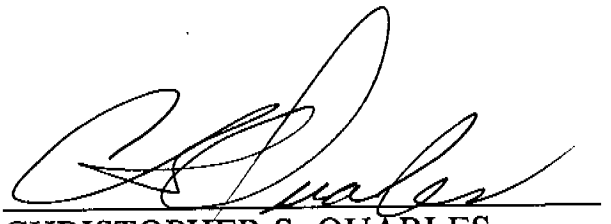
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Michael Robinson, #713735, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 20th day of January, 1999.



CHRISTOPHER S. QUARLES
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CERTIFICATE OF FONT

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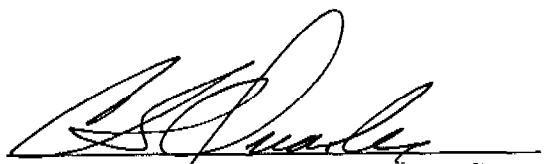

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