IN THE SUPREME COURT OF FLORIDA

MICAH NELSON,	:	
Appellant,	:	
vs.	:	Case No. SC00-876
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ISSUE I

THE TRIAL COURT ERRED BY FAILING TO GRANT NELSON'S MOTION TO SUPPRESS HIS STATEMENTS AND ADMISSIONS, AND THE RESULTING EVIDENCE, BECAUSE HIS STATEMENTS WERE INVOLUNTARY AND THUS WERE NOT TRUSTWORTHY OR RELIABLE.

Undersigned counsel relies on the Initial Brief of Appellant as to this issue.

ISSUE II

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON AND FINDING THAT NELSON KILLED THE VICTIM TO AVOID A LAWFUL ARREST, BECAUSE THE EVIDENCE FAILED TO PROVE THIS AGGRAVATOR BEYOND A REASONABLE DOUBT.

If, as Appellee asserts, Nelson killed the victim solely or at least primarily, to eliminate her as a witness, why did he not kill her at her apartment? Had he done so, he would not have needed to take her car and would not have ultimately been found asleep in it. Three out of four of the trial judge's reasons for finding this factor were based on Nelson's abduction of the victim, and his taking her to a remote location to kill her. This fact actually suggests that because the victim was screaming in her apartment, Nelson took her with him because he did not know what else to do. This is, in fact, what his statements to the police revealed.

Appellee asserts that we "selectively" pointed to Nelson's admission to law enforcement that he was mad at the world and "just lost it." (Brief of Appellee at 48) This was "selectively" chosen because it was Nelson's **first** response to law enforcement when asked why he had committed the crime, and was the **only** response that was not influenced by what the officers suggested to him. Because he was just mad at the world, he did not understand why he had raped or killed the victim, so adopted suggestions offered by the officers. When Officer Robinson **first** asked him why this happened, however, Nelson told him that he was just "mad at the

world; mad about his life." (21/2458-60) In other words, he was confused, in general. This becomes clearer when he goes to sleep in the victim's car, thus leading to his arrest.

The portions of Nelson's confessions to law enforcement quoted by Appellee (brief of Appellee at 50-52) show exactly how the officers suggested to Nelson that he killed the victim so that she would not identify him:

> Officer: So you were worried about her calling the police if you left?
>
> Nelson: Yes.
>
> Officer: So you felt like she could identify you then? Huh?
>
> Nelson: Yes.

(21/2469) Later, the officer asked Nelson,

> Officer: Was it dark in the room when you went in there?
>
> Nelson: Yes.
>
> Officer: okay. Well, how do you feel she got a look at your face and could identify you?
>
> Nelson: (Inaudible)
>
> Officer: That's when you took her out there though, right. So prior to that could she identify you?
>
> Nelson: Yes.
>
> Officer: Any how is that if it was dark?
>
> Nelson: From the bathroom light (Inaudible).

(21/2482) Even with this suggestive questioning, Nelson did not say that this was the reason he killed Ms. Brace. Nelson was just

answering the officer's query as to how she could have seen his face in the dark house. (21/2482-83)

The officers also suggested to Nelson that he intended to kill Ms. Brace at the orange grove where her car became stuck in the sand, and Nelson merely agrees with them:

> Officer: Now, where was this at when you got stuck in the dirt?
>
> Nelson: Frostproof (Inaudible)
>
> Officer: Were you going to kill her there?
>
> Nelson: Yes.

(21/2484) At one point, Nelson told the officer that he killed the victim because he got scared. (21/2488) Nelson told Sergeant Robinson that he first tried to choke the victim until she passed out in the grove, so that he could leave. (22/2614) This suggests that he first intended to incapacitate and abandon her so that he could get away. He may have vacillated about what to do with her, even after driving to Polk County. Nelson told the officers that both he and Ms. Brace were scared when they walked into the grove. Nelson's reaction when he went with the officers to find the body, shows clearly that he was horrified by what he had done.

It may seem as though the most likely reason Nelson would have killed the victim was so that she would not identify him. This was the apparent reasoning of law enforcement when the officers were questioning Nelson. We must remember, however, that Nelson was not a normal rational person who reasoned like the law enforcement officers. He was of limited intelligence, had limited education,

had been chronically seriously depressed since he was a child, and suffered hallucinations at times.

Thus, a consideration of the whole record shows that Nelson did not know why he killed the victim. As noted by Appellee (brief of Appellee at 53), Nelson told Dr. Dee that he did not know why he killed the victim.[1] (25/3101) Had he killed her solely or primarily to avoid arrest for the crime, he would have followed through by disposing of her car, rather than going to sleep in it not far from his own home, where he was discovered by law enforcement.

Appellee incorrectly argues that we did not preserve the issue that the "avoid arrest" aggravating factor was unconstitutional because it failed to provided sufficient definition. Prior to trial defense counsel filed a "Motion to Declare Section 921.141 and/or Section 921.141(5)(e), Florida Statutes and/or its Standard Instruction Unconstitutional Facially and as Applied and To Preclude its Use at Bar." (2/278-80) Section 921.141(5)(e) provides that "[t]he capital crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." The motion alleges that the "avoid arrest" aggravating circumstance is unconstitutionally vague and overbroad, and that it has been applied in an inconsistent manner, repeating other aggravators, and

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[1] Appellee states that Dr. Dee "stated that appellant did not mention hearing voices on the day of the killing (R3182)" (Brief of Appellee at 53) Appellee neglects to mention, however, that Nelson told Dr. Dee he was visually hallucinating on the day he killed the victim (25/3182), and, on other occasions, he had "command auditory hallucinations," which were verified by jail records. (25/3153-56)

thereby failing to genuinely narrow the class of death eligible persons. (2/278-79)

The motion was accompanied by a Memorandum of Law. (2/281-89) Among other things, Appellant argued in the memorandum that the aggavator is applied arbitrarily. For example, this Court rejected the trial court's application of the aggravator in Garron v. State, 528 So. 2d 354, 360 (Fla 1988), even though the victim was on the telephone calling the police when the defendant shot her, while approving its application in other similar cases. (2/284) Appellant also pointed out, in the memo, that the "avoid arrest" aggravator's application only to murders in which there is "very strong" evidence that the dominant or only motive was to avoid arrest, means that the crime also satisfies the requirements of the "cold, calculated and premeditated" factor, resulting in unconstitutional doubling.[2] (2/285)

At the charge conference on December 20, 1999, defense counsel renewed this motion, which had been previously denied, and the trial judge relied on his previous ruling, thus again denying the motion. (24/2854) Later, during charge conference, defense counsel argued that the "avoid arrest" and "CCP" aggravators constituted improper doubling. (24/2882) It is the defendant's alleged motive -- killing the victim to eliminate her as a witness and thus avoid arrest and imprisonment, that makes the crime cold, calculated and

[2] At trial, defense counsel argued this point to the judge. (24/2882) In fact, the judge first suggested that the "avoid arrest" and the "CCP" aggravators might be "doubling. (24/2880) Defense counsel argued that, although the law allowed both aggravators, he agreed with the judge. (24/2882)

premeditated. Were the crime one of passion or sudden hostility, it would not be cold, nor would it be calculated.

A trial court's finding of an aggravator is reviewed under the substantial competent evidence standard. Mansfield v. State, 758 So. 2d 636 (Fla. 2000); Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997). The State must prove this and every aggravator beyond a reasonable doubt. Such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1982), after remand 674 So.2d 96 (Fla. 1996); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982). Certainly, it may not be based on speculation. Hertz v. State, 26 Fla. L. Weekly S725 (Fla. Nov. 1, 2001).[3] In this case, considering the bizarre circumstances of the case, the defendant's mental condition (much of which was never really discovered or clarified), and the inconsistency of the evidence,[4] the State cannot prove **beyond a reasonable doubt**, that

[3] In Hertz, the defendant and a co-defendant had gone to school with one of the victims whose family had at one time lived across the street from defendant Hertz. The defendants specifically discussed leaving no witnesses, and after methodically executing the victims, destroyed their home and bodies by fire to eliminate evidence and prevent arrest. The case at hand is far different.

[4] Although Nelson told the officers that he took the victim from her house because she was screaming, he was scared, and did not know what to do, the judge decided that he intended to kill her when he took her from the house. (7/1076) If this were so, he would have had no reason to drive around for six hours before killing the victim. Thus, the fact that he took her to a remote place where he killed her does not show that Nelson committed the crime to avoid arrest. He would have been more likely to have avoided arrest had he killed her in her apartment and left her

Nelson killed Ms. Brace to avoid arrest. Thus, this aggravator should be stricken and the case remanded for resentencing.

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car alone. Had he obliterated his fingerprints, he might never have been suspected. Accordingly, we see no reason linking the avoid arrest factor to taking the victim to a remote place.

ISSUE III

THE TRIAL COURT ERRED BY FINDING THAT THE HOMICIDES WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellee asserts that Nelson's "decision to [kill the victim] called for considerable calculation as to how and where it should be done." (Brief of Appellee at 57) If this were so, why would he have taken Ms. Brace from her home and driven around for six hours only to take her to an orange grove where he got stuck in the sand; then to another orange grove where he had no weapon to kill her. If, as he told police, he walked her into the orange grove, why did he not take a weapon? Why did he have to return to her car **twice**, looking for something with which to kill her? Nelson's actions exemplify a confused young man who was frightened and did not know what to do. Dr. Dee probably did not talk with Micah Nelson about his thoughts while driving around or committing the crime because Nelson did not know what he was thinking.

Nelson's actions at the first orange grove where he became stuck in the sand show nothing about his motives, plans or feelings. Although Appellee asserted that Nelson was calm "throughout the ordeal," the evidence showed that he was not calm at all -- he was very nervous. Steve Weir, who pulled Nelson out of the sand, thought the car did not "fit" this man who **paced, seemed very nervous, and would not look Weir in the eye**. The man took off without even thanking Weir for helping him. (19/2086-96) This does not describe someone who was calm, cool and collected.

Although Appellee mentioned various times that Nelson told the officers he was going to kill the victim there, this was only Nelson's agreement to the officer's suggestion. (21/2484) (quoted in brief of Appellee at 52) Nelson also told Sergeant Robinson that he first tried to choke the victim until she passed out in the grove, so that he could leave. (22/2614) He may have vacillated about what to do with her, even after driving to Polk County and, when she would not pass out, ended up killing her. This is just as likely as the conclusion that he planned to kill her and calculated the killing. To determine whether a murder is CCP, the focus is on how the crime was executed: advance procurement of a weapon, lack of provocation, and killing carried out as a matter of course. Hertz, 26 Fla. L. Weekly S725; Rodriguez v. State, 753 So. 2d 29, 48 (Fla. 2000). Here, Nelson did not procure a weapon in advance and the killing was not carried out as a matter of course. To the contrary, he apparently drove around for hours not knowing what to do. The provocation may have been the victim's screaming and, later, her refusal to just pass out. Although this may not be rational provocation, the defendant was emotional, scared and tired, and was not rational.

This murder was not carried out with "ruthless efficiency," as in Jennings v. State, 718 So. 2d 144 (Fla 1998), as suggested by Appellee (see brief of Appellee at 59); Nelson did not even take a weapon although he had six hours during which he could easily have procured at least a knife. He did not plan to use the fire extinguisher or the tire iron because he did not take them with him

when he walked the victim into the grove. He only went back for them when she would not easily pass out. This is easily distinguishable from Ford v. State, 26 Fla. L. Weekly S602 (Fla. 2001), cited by Appellee, at 61, where the defendant "executed" the victims with a gun, axe and knife. Nor is this case similar to Connor v. State, 26 Fla. L. Weekly S579 (Fla. 2001), where the defendant hid the victim while contemplating how to kill her; chose a noiseless weapon; and was calm, cool and collected while rendering thoughtful and enigmatic responses to police. Micah Nelson kept his head in his hand during most of the interviews with police and had tears in his eyes when they asked about the victim. His usual response to their questioning was merely "yes," or "inaudible." Although he may have appeared calm, he was certainly not unemotional and, in fact, became more emotional as time went by. By the time he showed the officers where to find the body, he was shaking and crying.[5]

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[5] Just before Nelson was transported to the Highlands County sheriff's office, the officers asked if he would help them find Ms. Brace. He hung his head and started to cry again but maintained that he didn't know. (4/498-99) At a later interview, when Nelson spontaneously agreed to take them to the body, he was crying. (4/526) Several times Nelson appeared to be crying but kept his head down so it was hard to tell. At this interview, he seemed sadder and more emotional. (4/640-41) He looked up only occasionally and briefly. (4/664-65) When they arrived at the grove, he started shaking and crying and he pointed and said, "She's down there I'm not going down there. You're not going to make me go down there are you?" He appeared scared. (4/530) Because Nelson looked distraught and was crying, Detective Burke put his hand on Nelson's shoulder and said, It's all right, Mike." (4/650-51)

Finally, this case in no way resembles Farina v. State, 26 Fla. L. Weekly S527 (Fla. 2001), where Taco Bell employees were "rounded up" and confined to a small area, and the perpetrators discussed their plan to kill the victims. Nelson did not wear gloves or a mask when he entered the victim's home because he did not intend to commit a crime until he saw an open window and went inside. Ms. did offer some resistance, at least at her home, and Nelson did not discuss "witness elimination" with anyone. As previously discussed, his "statement" to police that his motive to "eliminate her as a witness," was only a "yes" response to their suggestion, and was made only after his initial statement that he committed the crime because he was "mad at the world" and at his situation. (See discussion in Issue II, supra.) Moreover, Nelson never said he confined Ms. Brace to the trunk of her car until he "decided the best location to kill her to avoid detection." This is merely Appellee's speculation. (See brief of Appellee at 65)

Because this aggravator is based solely on speculation, and for the reasons set out in Appellant's Initial Brief, the Court should strike this aggravator, as well as the "avoid arrest" aggravator, and remand for resentencing.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND WEIGH SEVERAL UNREBUTTED MITIGATING CIRCUMSTANCES THAT WERE CLEARLY ESTABLISHED.

As noted by Appellee, even uncontroverted evidence can be disbelieved and rejected by the trial court when in the form of opinion testimony. (Brief of Appellee at 68-69)(citing Walls v. State, 641 So. 2d 381, 390-391 (Fla. 1994). The court may only reject such evidence, however, if the record contains **competent, substantial evidence** to support his rejection. In this case, Dr. Henry Dee's unrebutted testimony that Nelson suffered from chronic long-term depression, hallucinations and brain damage was supported by two psychiatrists. The State presented no evidence to rebut Dr. Dee's conclusions. Yet the trial judge relied on testimony by Nelson's friends and family, who had no mental health training and probably a minimum of education, that Nelson acted "normal" at the time of the murder, to reject the psychiatric findings.

A factor is mitigating under the facts in the case if it is shown to be mitigating by the greater weight of the evidence. See Campbell, 571 So. 2d 415, 419 (Fla. 1991) ("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**." (footnote omitted)). Surely, the unrebutted opinions of a psychologist and two psychiatrists establish that Nelson suffered from mental and emotional illness, contrasted with the testimony of family and friends who thought he was normal.

In Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), this Court established standards of review for mitigating circumstances which were as follows: 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the **competent substantial evidence** standard; and (3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the **abuse of discretion** standard.

In Trease v. State, 768 So. 2d 1050 (Fla. 000), the Court modified the Campbell[6] standard in one respect:

> We hereby recede from our opinion in Campbell to the extent it disallows trial courts from according no weight to a mitigating factor and recognize that there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight. The United States Supreme Court has held that a sentencing jury or judge may not preclude from considering any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence less than death. Nevertheless, these cases do not preclude the sentencer from according the mitigating factor no weight. We therefore recognize that while a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case. For example, while being a drug addict may be considered a mitigating circumstance, that the defendant was a drug addict twenty years before the crime for which he or she was convicted may be sufficient reason to entitle the factor to no weight.

[6] Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990).

Trease, 768 So. 2d at 1055 (citations omitted). The Campbell standard thus remains the authoritative criterion in this area, as modified by Trease. Ford v. State, 26 Fla. L. Weekly S602, 605 (Fla. Sept 13, 2001).[7]

Although Dr. Dee observed that depression would be normal for someone facing first-degree murder charges, as asserted by Appellee (see brief of Appellee at 70), he also determined from jail records that Nelson's attempt at suicide was genuine. He believed that Nelson's suicide attempt resulted from a combination of acute depression because of his **guilt for what he had done** and extreme depression about the situation he was in. In other words, a combination of intense remorse and depression over what could possibly happen to him. (25/3031-32) Appellee nor the trial judge can point to any evidence showing that Nelson did not feel guilt and depression after and because of the crime he had committed.

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[7] In Ford, Justice Pariente, joined by Justice Anstead, expressed her concern that the majority's explanation of holdings in Campbell and Trease may unintentionally lead to trial judges rejecting mitigating evidence established by a preponderance of the evidence by assigning it no weight and thus result in disparity in the way trial judges evaluated mitigating circumstance. Thus, she questioned the wisdom of having receded from the clear dictates of Campbell, as to how to evaluate mitigating evidence. See Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("if a court in a capital case fails to weigh "aspects of the defendant's character and record and ... circumstances of the offense proffered in mitigation," there is a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."); see also Eddings v. Oklahoma, 455 U.S. 104, 112-13 (1982) (sentencer may determine weight to be given relevant mitigating evidence, but may not give it no weight by excluding such evidence from its consideration).

Appellant contends that, unlike cases in which this Court remanded because the trial court did not consider the mental mitigation even as non-statutory mitigation, the trial judge did find nonstatutory mitigation. This is misleading. Although the trial judge wrote paragraphs in his sentencing order as to each mitigator suggested by the defense, his findings were merely rhetoric. He did not really find or consider any mental mitigation at all, and he accorded what really constituted two statutory mitigators, "little weight." (See paragraphs quoted by Appellee, brief at 70)

In paragraph 6 of his sentencing order, the trial court allegedly considered that "**Any** mental illness of the Defendant may have been controlled by medication." (7/1079) In his paragraph, he noted that Dr. Dee **was of the opinion** that Nelson had brain damage but did not suggest that medication would cure or alter that condition. He then noted that he had rejected Dr. Dee's theory that Nelson had an impulse disorder caused by brain damage. He noted that Dr. Dee did say that Nelson had been given medication for depression while in jail, had attempted suicide, and heard voices.[8] He closed by finding "this mitigating circumstance"

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[8] The trial court failed to recall that Dr. Ashby, the jail psychiatrist, testified prior to trial that Micah Nelson had been on two kinds of medication. Dr. Ashby treated Nelson for a schizo-effective disorder -- both a mood and a psychotic disorder. He said Nelson had intermittent episodes of depression and auditory hallucinations. He first treated Nelson with Mellaril (100 mg twice daily) which is an antipsychotic medication used to stop auditory hallucinations. At the time of trial, Nelson was taking a drug called Imipramine (250 mg twice daily) for depression, which also is used to treat auditory hallucinations which

reasonable established and according it "little weight." What he found reasonable established it unclear because he had just rejected Dr. Dee's findings of mental illness. Apparently, he found and gave little weight to the fact that Nelson received medication for depression in jail, which has nothing to do with whether he suffered from mental or emotional illness when he committed the crime, or whether he suffered depression prior to being in jail.

Paragraph 13 of his sentencing order is the same. The judge erroneously states that "[t]here was no expert testimony suggesting that his depression and suicide attempt were related to his conduct as opposed to the fact that he is charged with murder and is incarcerated." (7/1081) As we just related, Dr. Dee said clearly that his suicide attempt was caused by a combination of guilt for what he had done and his situation. (25/3031-32) The trial court obviously overlooked this part of Dr. Dee's testimony. Accordingly, the "little weight" the judge accorded this factor was apparently

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result from depression. The drug helped Nelson and contributed to his competency to stand trial. Dr. Ashby said that Nelson had a neurochemical imbalance which is indeed a mental condition. (15/1438-47)

In footnote 8, brief of Appellee at 71, Appellee notes that the trial court "obviously" considered and gave weight to Dr. Dee and Dr. Ashby's testimony "to find the depression medication factor." In other words, the trial court believed the **fact** that Nelson was on medication for depression while in jail. Appellee notes that Dr. Ashby testified that he was treating Nelson for a mood disorder, but fails to mention his other testimony, set out above, concerning the antipsychotic medication and the hallucinations.

based on the same circumstance as noted in paragraph 6 -- that Nelson tried to attempt suicide and was depressed while in jail.

The trial court's final paragraph arguably alluding to a mental problem (paragraph 20) concerns the fact that Nelson never received treatment for his mental or emotional problems. The judge did not discuss the fact that, throughout his childhood, Nelson had problems with depression, as diagnosed twice by Dr. Kremper (at ages 11 and 16), hallucinations, also noted by Dr. Kremper, and trouble in school at age 8, which the school system was unable to diagnose, and for which he received no treatment.[9] After his incestual sexual experience at age 11, he went to a counselor twice before his aunt took him out of counseling.[10] Rather than discussing this proposed mitigator, as to which the trial court heard testimony, the judge simply noted that Nelson was on antidepressive medication "currently," and gave that "little weight."

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[9] School records showed that Micah was retained in kindergarten and third grade, and repeated those grades. He received administrative or social promotions in first and second grade. (25/3163) Micah was tested by the school psychologist at age 8 because he was not making normal progress in school. Although the school never found an adequate reason for Micah's problems, Dr. Dee suspected it was Micah's brain damage and memory problems, which would have been hard to diagnose at age 8. (25/3135-38)

[10] His aunt terminated Micah's counseling after the second session, asserting that the children did not need counseling. Dr. Dee noted that Micah was diagnosed at that time as suffering from depression, characterized as adjustment disorder with depressed mood. Micah was later evaluated by Dr. Kremper, a psychologist, when he was about 16, and was again diagnosed with depression. (25/3136-38) Each time Micah was seen by a mental health expert, he was seen as depressed.

Thus, his third alleged nonstatutory mental mitigator was based solely on the fact that Nelson was receiving medication while in jail, which was more or less the same thing he considered in the other two paragraphs. In fact, in paragraph 20, he specifically did not find the mitigator proposed by the defense and yet he purported to give it "little weight."

Appellee references Dr. Dee's testimony that "records characterized [Nelson] diagnostically as "adjustment disorder with depressed mood." (Brief of Appellee at 72) This reference was to the one record made by the "counselor" of unknown variety, who saw Nelson twice after his incestual experience at age 11. (25/3137) At that time, although Nelson's 13-year-old sister and his seven-year-old nephew had gonorrhea, the sheriff's department never followed through to find out where these children might have acquired it, or what sort of sexual activity to which they may have been exposed.

Appellee also asserts, incorrectly, that Dr. Dee's impression of [Nelson's lack of supervision or neglect] was not confirmed by anybody other than Nelson himself. The fact that Nelson, at age 11, was left at home alone with his 13-year-old sister and his 7-year-old nephew, and that these children were having sexual relations with each other and someone who had gonorrhea clearly shows a lack of supervision. In fact, the older brother, John Eiland, who testified that the children were well supervised by the older brothers, was the one who left the pornographic video in the VCR where the children found it, and may well have been the one who gave them gonorrhea. He was 20 years old and living at home at the

time. The fact that Nelson's aunt, sister and cousins felt that Micah was treated the same as the other children does not mean that he did not feel as though he did not belong anywhere.

Appellee alleges that any error here would be harmless is unavailing. Mental health mitigation is the most important form of mitigation and carries great weight. See e.g., Santos v. State, 591 So. 2d 160 (Fla. 1991) If neither the "avoid arrest" nor the "CCP" aggravator were applicable, this would leave only four aggravators, two of which are found in many cases (committed during a felony and on felony probation). The judge gave little or no weight to the sixth aggravator -- the victim's vulnerability, due to a paucity of case law for guidance. Although HAC is a weighty aggravator, even heinous murders do not always result in a death sentence, especially when there is mental mitigation.

Appellee agreed with the trial judge that Nelson's brain damage was not supported by objective evidence such as medical testing -- a CT scan or an MRI. Dr. Dee testified that the results of his tests were not in question. The neuropsychological tests he performed substantiated that Nelson suffered brain damage. People with cerebral damage are very impulsive and don't think things through. They do things that do not make sense.[11] Dr. Dee testified that this was not controversial. Much research verified these findings. (25/3198-99, 3201) Dr. Dee's other findings were consistent with this diagnosis. (25/3199) Moreover, medical tests do

[11] For example, Micah Nelson went to sleep in the victim's car, parked along a road not too far from where he lived.

not always show brain damage and are not necessarily the best way to determine brain damage. Although brain damage does not always affect the structural integrity of the brain tissue, as measured in an MRI, brain functioning may be altered.

In Brown v. State, 755 So. 2d 616 (Fla. 2000), this Court affirmed the trial court's denial of Brown's motion for post-conviction relief based upon, among other things, trial counsel's failure to sufficiently investigate Brown's background in preparation for penalty phase. At the original trial, Dr. Robert Berland, a clinical psychologist, and Dr. Walter Afield, a psychiatrist, were appointed to evaluate Brown's mental status. Dr. Berland administered several standardized psychological tests, including an intelligence test, upon which both he and Dr. Afield relied, in reaching their conclusions concerning Brown's mental health problems. Both doctors testified that Brown suffered from organic brain damage and was psychotic. Both noted his marginal intelligence. 755 So. 2d at 631-32.

At the evidentiary hearing, defense counsel testified that "Dr. Berland, the most thoroughly prepared forensic psychologist he knew, did not indicate the need for further data in order to render his opinion of Brown's mental status." Thus, he did not request further neurological testing to confirm organic brain damage. 755 So. 2d at 632. Dr. Berland testified that

> he did not recommend a CAT scan for Brown because this neurological test was imprecise in measuring organic brain damage and, if the test showed no brain damage, that result could be used against Brown at trial.

755 So. 2d at 632 n.13. At the evidentiary hearing, Dr. Henry Dee, who testified in the case at hand, testified that he had examined Brown and his conclusion was consistent with the opinions of Drs. Berland and Afield, that Brown suffered organic brain syndrome and a long-standing major emotional disturbance manifested as schizophrenia. Several other mental health authorities testified at the hearing, after which this Court found that trial counsel had not been ineffective in investigating Brown's background, and affirmed the trial court's denial of the motion for post-conviction relief. 755 So. 2d 634-36.

In Rogers v. State, 783 So. 2d 980 (Fla. 2001), this Court affirmed the trial court's denial of Rogers' request for a PET scan because the psychologists, Dr. Maher and Dr. Berland, had performed written tests and otherwise evaluated Rogers and found him to have brain damage, and medical records showed that he had been medicated for seizures at one time. Thus, the trial court did not believe further testing was necessary. Appellee suggests that because an EEG, CT scan, MRI or a PET scan might have shown improper functioning of the brain, the trial court was justified in rejecting Dr. Dee's testimony that Nelson had brain damage. This is contrary to the majority finding in Rogers, as well as the reasoning set out in the dissents. See dissents in Rogers Even if an MRI had been done and had shown no brain damage, this would not rule out brain damage. See Rogers; Brown.

Appellee alleges that there was little in the record to indicate remorse. (Brief of Appellee at 80) In addition to Dr.

Dee's testimony concerning Nelson's guilt which in part caused his attempted suicide, the entire suppression hearing and officers' testimony showed Nelson's remorse. Perhaps he did not describe the actual crime to Dr. Dee because he was so horrified by what he had done that he did not want to even think about it. This may have been why he never admitted to the sexual battery.

When Officer Robinson told Nelson that he needed to tell the truth about what happened, and that Ms. Brace's family would appreciate his helping them, Nelson had tears in his eyes and appeared to be emotionally upset. He put his head in his hands. Robinson put his hand on Nelson's back and told him that it would be ok -- just to tell them where the victim was. (21/2452-53)

When Nelson was transported to the Highlands County sheriff's office prior to his departure, they asked him if he would help them find Ms. Brace. He hung his head and started to cry again but maintained that he didn't know. (4/498-99) When Nelson agreed to ride with them to show them where she was, he was crying. (4/456; 21/2453-54)

As they were walking along the grove area, Nelson started shaking. Robinson testified that Nelson was extremely emotionally upset and crying. 21/2454-56) Detective Burke was able to see Nelson's face and could see tears on his face; he appeared to be frightened. He asked, "you are not going to make me go down there, are you?" (22/2634) Robinson told Nelson they would not make him go with them. Nelson was physically shaking and crying. (4/530-31; 21/2454-56; 22/2620-21) When Nelson looked distraught at orange

grove, and was crying, Burke put his hand on Nelson's shoulder and said, It's all right, Mike." (4/650-51)

ISSUE V

A SENTENCE OF DEATH IN THIS CASE IS DISPROPORTIONATE WHEN COMPARED TO OTHER CAPITAL CASES IN WHICH THE DEFENDANT WAS MENTALLY DISTURBED.

As noted by Appellee, Proportionality review is not simply a comparison between the number of aggravating and mitigating circumstances. Terry v. State, 668 So. 2d 688, 965 (Fla. 1996). Nevertheless, it is hard not to consider numbers in determining weight. It may be noted that, in comparing other cases to this one, Appellee cited the number of aggravating circumstances. (See brief of Appellee at 92). Indeed, undersigned counsel has often done the same. With the number of aggravating factors that are set out in the statutes, it no longer difficult to find cases with six aggravators. (See examples Appellee cited in brief). While new aggravators such as the "vulnerability" aggravator are added, new mitigators don't seem to be added. Statutory mitigating circumstances include the following: no prior criminal history, extreme mental disturbance, participation of the victim, minor role, extreme duress, impaired capacity, and age. See § 921.141(6)(a-g), Fla. Stat. (1997). Thus, even if all of the mitigators were established, there would be only seven. Additionally, "any aspect of a defendant's character or record and any of the circumstance of the offense' that reasonably may serve as a basis for imposing a sentence less than death" may serve as a nonstatutory aggravator. See Campbell, 571 So. 2d at 419 n.4. Nevertheless, statutory

mitigators which are enumerated seem to carry more weight. In this case, defense counsel chose not to list any statutory mental mitigators for the jury, but to call them all nonstatutory mitigators, so that the jurors would not use a counting process. (24/2917-24)

Although the trial court purported to weigh the aggravating factors and mitigating factors, it may be noted that he gave five out of six aggravating factors "great weight" and almost all of the mitigation "little weight." This suggests perhaps an unconscious prejudgment based upon the sentence he was about the render. Three of the twelve jurors voted for life, showing that at least three allegedly reasonable people believed some of the mitigation deserved more than "little weight."

Appellant did not intend to "gratuitously insult" the jury, as Appellee suggests (brief at 95), nor the trial judge, by suggesting racial bias based on the race of the defendant and victim. Actually, this was not an original thought by undersigned counsel, and was even suggested by defense counsel. (6/886) Unconscious racial bias has been shown by a number of studies.

In Foster v. State, 614 So. 2d 455 (Fla. 1992), Foster challenged the trial court's refusal to allow him to show that the use of the death penalty in Bay County was racially discriminatory. Relying on McCleskey v. Kemp, 481 U.S. 279 (1987), this Court found that Foster must show that the prosecutor acted with purposeful discrimination in seeking the death penalty in his case, despite studies showing that a disparity between imposition of the death penalty based upon the race of the victim and the race of the

defendant (defendants charged with killing white victims more often received the death penalty). 614 So. 2d at 463.

In a dissent, joined by Justices Shaw and Kogan, Justice Barkett disagreed with the majority decision because it set a standard that required a showing of something that was impossible to show: **purposeful** discrimination. Justice Barkett quoted Justice Marshall, from his concurring opinion in Batson v. Kentucky, 476 U.S. 79, 93-96 (1986), as follows:

> A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported.

614 So. 2d at 465 (Barkett, J., dissenting) (quoting from Batson, 476 U.S. at 106, Marshall, J. concurring). Justice Barkett noted further that

> studies of unconscious racism have shown that the perpetrator does not feel particularly punitive toward minorities; rather, he or she wants to remain distant and is less likely to feel empathy because of the distance. Sheri Lynn Johnson, **Comment**, Unconscious Racism and the Criminal Law, 73 Cornell L. Rev. 1016, 1020 n.27 (1988). While society has largely rejected blatant stereotypes and overt discrimination, more subtle forms of racism are increasing: "A burgeoning literature documents the rise of the 'average' racist, a person whose ambivalent racial attitudes lead him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously." Id. at 1027-28 (footnotes omitted).

Justice Barkett concluded, in proposing a standard for Florida to evaluated statistical evidence of discrimination, that "[a]s

important as it is to ensure a jury selection process free from racial discrimination, it is infinitely more important to ensure that the State is not imposing the ultimate penalty of death in a racially discriminatory manner. 614 So. 2d at 466 (Barkett, J., dissenting, joined by Shaw, J. & Kogan J.). (See also Robinson v. State, 773 So. 2d 1, 4 (Fla. 2000) (following Foster).

Thus, it is not in undersigned counsel's imagination that unconscious discrimination exists, nor is it our purpose to accuse the trial court or jurors of discrimination. This is but one of a number of reasons, set out in our Initial Brief, why this Court should find that the "avoid arrest" and "CCP" aggravators were not established; that the trial court should have found and given substantial weight to the mental mitigators, and why this Court should reverse and remand for a life sentence or, alternatively a new penalty phase trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 2002.

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