IN THE SUPREME COURT OF FLORIDA

ALWIN C. TUMBLIN,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC07-2111
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For St. Lucie County
[Criminal Division]

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POINT I THE TRIAL COURT ERRED IN LETTING LIEUTENANT SMITH, A SENIOR POLICE OFFICER, TESTIFY TO ANTHONY MAYES'S PRIOR CONSISTENT STATEMENT.

Appellee argues that the statements were admitted to rebut a charge of recent fabrication. AB at 12-15. In fact, appellant made no charge of recent fabrication.

Appellant elicited evidence[1] and argued that Mayes, Rhonda, and Ruth were in constant contact with each other and concocted the story before Mayes talked to the police. Counsel said in opening (T73 3805-06 (e.s.)):

> *And you're going to be able to see through testimony how these witnesses interacted and were able to back up their stories with one another because they were in constant contact.* All three people that testify in this case as actual witnesses to the event have a reason to testify the way they're testifying, whether it be helping to destroy fruits of the crime, i.e. the bills and the envelopes that you'll hear about, or actually being at the scene of the crime as in the case of Anthony Mayes.

Likewise, he argued in closing (T83 5074 (e.s.)):

> They rely very heavily, if you will remember, on Nicole Jean Ruth, Rhonda Tumblin and Anthony Mayes. All of which, if you'll recall the testimony, were interconnected with phone calls back and forth, all of which spent time after this incident out of custody, and phone calls back and forth. Anthony Mayes was back and forth to Rhonda Tumblin's house. Anthony Mayes on July 2nd was at Rhonda Tumblin's house when the detectives came up. Rhonda Tumblin told you that she told the detectives, "Just wait, he'll come back after he

[1] *See* T76 4229 (Ruth); T78 4507, T79 4583 (Rhonda); T80 4702-03 (Mayes).

sees you have been here because he wants to know what's going on."
Is it any surprise that their stories are interlocked?

Thus, he contended that Mayes fabricated a story with Rhonda and Ruth, then told that story to Smith, who summarized this previously fabricated account to Investigator Hamrick in Mayes's presence. T80 4678. Having just heard Smith relate his fabricated account to Hamrick, Mayes knew they both expected to hear it. He had a motive to repeat or regurgitate the previously fabricated story, and not to fabricate a new one. In short, the defense argued that he had already done the fabricating, and now had to press on with the previously fabricated story.

Counsel did not imply on cross of Mayes that Smith provided a story to repeat on tape.[2] In fact, had he so implied, the prosecutor would have asked Smith and Mayes whether that happened, but he did not. Thus, this is unlike *Shellito v. State*, 701 So.2d 837, 841 (Fla. 1997), where a prior consistent statement rebutted "the 'inference of recent fabrication based on information obtained.'" Nor is it like *Nussdorf v.* State, 508 So. 2d 1273 (Fla. 4th DCA 1987), where the defense implied the state had recently "helped" the witness remember.

Lastly, this case isn't like *Chandler v. State*, 702 So.2d 186 (Fla. 1997), where the defense asserted that the witness had two motives to fabricate—a

[2] Appellee relies on the recross of Mayes, AB at 11, but this reliance is misplaced. Counsel there sought to correct the misimpression, left by the state's redirect examination, that Smith's summary was only eight lines.

beating caused by the defendant, and money received from a TV show. This Court held admissible a consistent statement made between those two events (*id*. at 198):

> [B]y directly suggesting that the *Hard Copy* appearance motivated Kristal's testimony, Chandler could not thereafter prevent the State from rehabilitating her testimony by urging that another motive to fabricate existed earlier. That was a choice that the defendant made in urging more than one reason to fabricate at trial. Having made this choice, he must suffer its natural consequences.

Unlike in *Chandler*, appellant did not claim Mayes had two motives to fabricate. He said Mayes had one reason to fabricate and one reason to repeat the fabrication. Mayes's prior statement was made after the reason to fabricate. Thus, this case is more like *Parks v. State*, 644 So. 2d 106 (Fla. 4th DCA 1994), where the judge erred in admitting the codefendant's taped-statement to police made after the codefendant had an improper motive.

The error in letting Smith repeat Mayes's story was not harmless. Smith put a "cloak of credibility" on Mayes's testimony. *Brown v. State*, 344 So. 2d 641, 643 (Fla. 2d DCA 1977). "When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave." *Perez v. State*, 371 So. 2d 714, 716-17 (Fla. 2d DCA 1979). *See also Rodriguez v. State*, 609 So. 2d 493 (Fla.1992) ("[W]e take this opportunity to caution trial courts to guard against allowing the jury to hear prior consistent statements which are not

properly admissible. Particular care must be taken to avoid such testimony by law enforcement officers.").

Mayes alone described what happened inside the auto shop, and it was harmful to have his account related by the more credible Lieutenant Smith. The improper evidence gained extra punch when Smith vouched for the story by saying that he *assured* Coleman he thought Mayes would tell the truth (See Point II).

Appellee has not met its burden to prove the error harmless beyond a reasonable doubt. It shows only that there was other inculpatory evidence besides Mayes's testimony. (And even here, only Mayes testified to the events inside the garage where the killing took place.) But the focus of harmless error analysis is the effect on the trier-of-fact. "The question is whether there is a reasonable possibility that the error affected the verdict." *State v. DiGuilio*, 491 So. 2d 1129, 1139 (Fla. 1986). The state extensively argued Mayes's account in closing. T83 5030, 5036-37, 5041-44, 5068. Because he was such a key witness, it cannot be said that there is no reasonable possibility that the error in bolstering his credibility was harmless. Moreover, appellee makes no claim of lack of prejudice as to penalty.

<u>POINT II</u> THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN LIEUTENANT SMITH TESTIFIED THAT HE TOLD ANOTHER OFFICER THAT ANTHONY MAYES "WOULD TELL HIM THE TRUTH".

Appellee tries to distinguish *Acosta v. State*, 798 So. 2d 809 (Fla. 4th DCA 2001), by inflating the importance of the bolstered witness there (Sarah Riley) and diminishing Mayes's importance at bar. Appellee claims "the evidence against Acosta relied solely on the testimony of the uncharged co-defendant." AB at 21. Though Riley was, as the court said, a "key witness," she was not the state's entire case: an expert testified it was "probable" the handwriting on the check was Acosta's despite some discrepancies. Appellee also claims the detective in *Acosta* said "he believed [Riley's] story." AB at 21. In fact, he was less emphatic: "Up until that point, everything Sarah Riley told me appeared to be truthful." *Id*. at 809.

To diminish Mayes's importance, appellee says the evidence in this case "proves Tumblin had the gun and was the actual shooter."AB at 23. In fact, this issue was hotly disputed and the evidence on it was contradictory. For example, Mayes said appellant put a rag around the gun when he shot the victim; yet only Mayes was seen leaving the garage with a rag. And most importantly, Mayes provided the only direct evidence that appellant was the shooter. His credibility could not have been more crucial as to what happened inside the shop.

Appellee says "Smith made an isolated statement which the court struck." AB 23. But many cases have been reversed because of brief, isolated, unrepeated comments. *E.g. State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) (error to deny mistrial for single isolated comment on silence); *Graham v. State*, 479 So. 2d 824 (Fla. 2d DCA 1985) (error to deny mistrial for brief reference to identification of defendant by two unknown persons, even though judge sustained objection, admonished prosecutor and instructed jury to disregard); *Watts v. State*, 921 So. 2d 722 (Fla. 4th DCA 2006) (error to deny mistrial for single comment on failure to testify); *Meade v. State*, 431 So. 2d 1031 (Fla. 4th DCA 1983) (error to deny mistrial after comment that Meade "forgot the fifth commandment, which was codified in the laws of the State of Florida against murder: Thou shalt not kill"); *Barnes v. State*, 743 So. 2d 1105 (Fla. 4th DCA 1999) (single remark in final argument that testimony amounted to mercenary actions of hired gun required reversal as fundamental error despite instruction to disregard); *Hurst v. State*, 842 So. 2d 1041 (Fla. 4th DCA 2003) (statement that informant said defendant was selling drugs and pointed to him).

Appellee implies Smith was not a compelling witness because he was known as "One Man Gang" and testified in civilian clothes. AB 23-24. But jurors would not be surprised that officers have nicknames, and might even find Smith's impressive. More importantly, Smith was probably the most credible officer that

testified. First, he worked for the sheriff's office and not the Ft. Pierce Police. The defense contended the Ft. Pierce police were bumblers and mishandled evidence and witnesses. It showed crime scene investigator Garrason received a written warning because he violated evidence handling procedures, and lead Detective Coleman received a reprimand. T78 4136, 4447. Even the state had to acknowledge their mistakes. T83 5056-57 (closing). Second, Smith had considerable experience (19 years); and as a lieutenant sheriff he was assigned to assist the Ft. Pierce Police Department (which obviously needed help). T80 4775.

In an attempt to use *Salazar v. State*, 991 So.2d 364 (Fla. 2008), appellee says "Smith did not opine to the jury that he believed Mayes, only that he hoped Mayes would tell the truth to Coleman." AB 24. Appellee is wrong. Smith testified, "I did assure Detective Coleman in front of Mayes that I felt like Mayes would -- would tell him the truth." T80 4782. When the state argued that Smith was saying that he *expected* Mayes to tell the truth, defense counsel disagreed; he said that from Smith's tone of voice this was a "serious vouching for Mayes' credibility". T80 4800. The court agreed with the defense (*id*.):

> THE COURT: Uh-huh. He was vouching to -- he was vouching to another officer that he felt like this person was going to tell him the truth.

Appellee says this case is unlike *Acosta* because there "the lead detective not only vouched for the only witness fingering the defendant but tailored the entire

investigation on his belief in her truthfulness." AB 24. In fact, the cases are quite similar. *Acosta* says, "The basis of the charges in this case were that appellant and two other people forged and cashed a check. One of the others involved, Riley, admitted her complicity, and testified for the state. " 798 So. 2d at 809. Thus, the state had other evidence that all three were implicated in the forgery, and Riley served to identify Acosta as the one who put pen to paper. The officer didn't tailor "the entire investigation" based on her story; it just caused him to focus on Acosta as the main person involved. The same is true here—Mayes's story caused officers to focus on appellant, and especially appellant as the shooter.

Appellee says: "Smith also did not say that Mayes was a truthful person." AB 25. Of course what he said was worse: he vouched for Mayes's story putting the blame on Tumblin.

POINT III THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO CONDUCT A *RICHARDSON* HEARING AFTER THE STATE FAILED TO DISCLOSE THAT JEAN NICOLE RUTH HAD RECENTLY BEEN SHOT AND WAS TAKING HYDROCODONE.

Appellee makes three arguments: there was no discovery violation; if there was a discovery violation, the court conducted a satisfactory *Richardson* hearing; if the court didn't hold a satisfactory *Richardson* hearing, the error was harmless.

Whether there was a discovery violation

Appellee very briefly argues there was no discovery violation because the information "had no exculpatory value." AB 26. But as appellee concedes (AB 26, 28), it has already lost that argument in the trial court, which found a discovery violation. Regardless, the defense is entitled to impeach a witness by showing "that the witness is using drugs at or about the time of the testimony itself". *Edwards v. State*, 548 So. 2d 656 (Fla. 1989). Hence, Ruth's drug use at the time of trial has exculpatory value and had to be disclosed.

Further, the state must disclose potentially exculpatory evidence even if its exculpatory value is "debatable." *Robinson v. State*, 522 So. 2d 869, 871 (Fla. 2d DCA 1987) (duty to disclose reports "of debatable exculpatory value"); *Perdomo v. State*, 565 So. 2d 1375 (Fla. 2d DCA 1990) (quoting and following *Robinson*); *Giles v. State*, 916 So. 2d 55 (Fla. 2d DCA 2005) (duty to disclose evidence that "could constitute exculpatory information"). *Cf. Little v. State*, 754 So. 2d 152 (Fla. 2d DCA 2000) (defendant entitled to depose witness who had "potentially exculpatory testimony"). In fact, in *Richardson v. State*, 246 So. 2d 771 (Fla. 1971) itself, this Court held that an inquiry was required even though it was unknown whether the evidence could have exculpatory value.

Further, a judge must inquire whenever apprised of a potential discovery violation. This Court wrote in *State v. Evans*, 770 So. 2d 1174, 1182 (Fla. 2000):

"we agree with the Third District that the trial court in this case failed to conduct a timely *Richardson* hearing upon being advised that the State had committed a possible discovery violation." *See also Landry v. State*, 931 So. 2d 1063, 1065 (Fla. 4th DCA 2006) (inquiry required "when there is a possible discovery violation in order to flesh out whether there has indeed been a discovery violation."); *H.T. v. State*, 967 So. 2d 374, 376 (Fla. 3rd DCA 2007) ("Because the trial court failed to conduct the requisite hearing, it was in no position to conclude that no discovery violation had occurred.").

Whether the trial court held a *Richardson* hearing

Appellee says the judge made an adequate inquiry. Appellant disagrees. The court did not make an adequate inquiry to determine, and in fact it did not determine, whether the violation was inadvertent, trivial, and harmless.

As to whether the violation was intentional or inadvertent, appellee says "the State did not consider the information relevant to the facts at trial and certainly not exculpatory," AB 28, a fact that shows appellee weighed the matter out and decided not to make disclosure.[3] Contrary to appellee's assertion, the trial court did

[3] Appellee also claims it learned about Ruth's hydrocodone use "just before she testified." AB at 28. In fact, she testified she told prosecutors that morning that she was taking pain medication, T76 4216, and the state did not dispute this testimony. Trial began that day at 9:50 a.m. T75 4048. Ruth did not begin testifying, however, until after 2:07 p.m. T75 4148. And the defense learned Ruth had been shot and was taking hydrocodone at 3:16 p.m. and in the middle of cross-examination. T76 4202. Thus, appellee knew for at least four hours—including

not find "the discovery violation to be inadvertent, trivial as to the issues at trial, and did not prejudice the defense." AB 29.[4]

Appellee says the violation was trivial because the judge found Ruth competent to testify. AB 29-30. But her competence did not relieve appellee of its duty to disclose and did not take away appellant's right to impeachment. The trouble with being surprised by discoverable evidence mid-trial is that the lawyers don't have time to think through its implications; this is why we have discovery rules. *Scipio v. State*, 928 So. 2d 1138, 1144 (Fla. 2006) (criminal discovery rules are designed to "prevent surprise"). Here, for example, defense counsel was surprised that Ruth was recently shot and was taking hydrocodone at the time of her testimony. His initial reaction was to question whether she was even competent to testify. Had he had some time to think (perhaps the four plus hours that the state knew that Ruth was taking hydrocodone and decided not to disclose it), he might have realized that the issue wasn't just Ruth's competency to testify, but whether her credibility and accuracy as a witness were diminished by her hydrocodone use, and whether he could or should impeach her with that information. The state's

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over the lunch recess—that a major witness was taking hydrocodone—a Schedule II or Schedule III controlled substance (depending upon the amount). § 893.03(2)(a)1.(j), (3)(c)(3)-(4), Fla. Stat. Moreover, the state knew two weeks before trial that Ruth had been shot. T76 4207-08.

[4] Appellee takes out of context the trial court's "I haven't seen any official misconduct" statement. AB 28. (T76 4205-06). The judge would later agree that the state is obligated to disclose matters involving witness competence. T76 4208.

failure to inform defense counsel of Ruth's hydrocodone use was not a trivial violation.

Harm or Prejudice

Finally, appellee makes no meaningful argument as to *procedural prejudice*, although it admits that defense counsel could, at the very least, have obtained an expert to "give general information about the effect of the drug." AB 31. Appellee does assert that there were things defense counsel could have done with the information and yet he didn't do them. *Id*.

But the state cannot catch counsel unawares and then complain that counsel did not know how to react. It is precisely *because* he could have done other things with the evidence that there was procedural prejudice and the error was not harmless. *Scipio*, 928 So. 2d at 1147, 1149 (procedural prejudice "considers how the defense might have responded had it known about the undisclosed piece of evidence"; "every conceivable course of action must be considered" (quoting *State v. Schopp*, 653 So. 2d 1016, 1020 (Fla. 1995)); *Barrett v. State*, 649 So. 2d 219, 221 (Fla.1994) (rejecting argument that objection was untimely: "We find the State's argument disingenuous, especially in light of the fact that the State failed to notify the defense about the recently obtained prints and the comparison before the expert testified. Defense counsel can hardly be faulted for not immediately

comprehending that the State had withheld this information or that the expert was testifying about something that occurred after he had previously testified.").

Finally, it is not quite accurate to say that defense counsel "asked for and was granted a brief continuance" (with the implication that he asked for and received a continuance to deal with the new evidence). AB 31. After ruling on the discovery objection, the court asked the parties if they needed a break. Defense counsel said he did, and the court recessed for 15 minutes. T76 4216-17. This was *not* a continuance granted to explore implications of the new evidence.

POINT IV THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Cold

The initial brief argued that appellant's actions after the offense belie a finding that the killing was "cold," i.e., the product of calm and cool reflection. IB at 53-54. Appellee says that his actions after the murder do not reflect his state of mind beforehand, and that he was simply nervous at the prospect of getting caught. AB at 35. But Ruth testified that appellant was sweating and acted like something was wrong immediately after the crime and before the prospect of apprehension. T76 4182. This is hardly the demeanor of one who has killed after "cool and calm reflection." Behavior after the crime may prove or disprove CCP. *See Williamson v. State*, 961 So. 2d 229, 238 (Fla.2007) ("cold" manner of murder was evidenced

by defendant's statements after murder "reflecting that he was disappointed that it took so much effort to kill the decedent."); *Hardy v. State*, 716 So. 2d 761, 766 (Fla.1998) (suicide attempt after the murder was "not an action characteristic of someone who reflected on his decision to extinguish the life of another.").

Calculation

Appellee says the "calculation" element of CCP was proved by evidence that appellant planned the robbery. AB 35-36. But the aggravator is "cold, calculated, and premeditated" *killing* rather than robbery. This Court wrote in *Castro v.* State, 644 So. 2d 987, 991 (Fla. 1994): "While the record reflects that Castro planned to rob Scott, it does not show the careful design and heightened premeditation necessary to find that the murder was committed in a cold, calculated, and premeditated manner." *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), struck CCP in a case where Rogers put far more thought and planning put into the robbery than appellant did. Rogers rented a car, "cased" the store, and then, with an accomplice, "pulled into an adjoining motel parking lot, donned rubber gloves and nylon-stocking masks and proceeded inside." *Id*. at 529.

As to whether appellant said that he would kill anyone who "resists" or anyone who "exists," appellee argues that appellant is "asking this Court to reweigh the evidence rather than determining if competent, substantial evidence supported the trial court's findings." AB 36. Appellee is mistaken. Appellant

argues there was no competent substantial evidence that he said "exists" rather than "resists." [5] Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *Jeantilus v. State*, 944 So. 2d 500, 501 (Fla. 4th DCA 2006), *quoting De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). At bar, Mayes testified that appellant said "exists," and then when impeached with his prior statement that appellant said "resists," he testified he didn't know what either word meant. T80 4662, 4709-10. And Mayes told Lieutenant Smith that appellant told him "that if the victim bucked, meaning if he *resists* or bucked up, that he was gonna cap him." T80 4781-82 (e.s.). In these circumstances, there is no "substantial basis of fact from which the fact at issue can be reasonably inferred."

Appellee argues that "the prior statements used to help prove CCP in *Hardy v. State*, 716 So. 2d 761 (Fla. 1998), *Young v. State*, 579 So. 2d 721 (Fla. 1991), and *Perry v. State*, 801 So. 2d 78 (Fla. 2001) were made long prior to the killings and were not specifically connected with the murder." AB 37. That's true of the statement in *Perry* (the statement was made six years before the offense, 801 So.2d at 91), but Hardy's statement was made several weeks before the murder, 716 So.

[5] On appeal, this Court determines whether competent substantial evidence supports the aggravator. *Diaz v. State*, 860 So. 2d 960, 965 (Fla. 2003). This Court also applies the competent substantial evidence test to individual facts in the sentencing order that the trial court claims support the aggravator. *Id*. at 967 ("We first note that portions of the sentencing order finding HAC are not supported by competent substantial evidence.").

2d at 766, and Young's was made on the way to the robbery, 579 So. 2d at 722-23. And appellee ignores *Clark v. State*, 609 So. 2d 513, 515 (Fla. 1992), where this Court found no CCP even though "evidence establishes that Clark decided to murder Carter at some point during the drive [to the scene of the offense]."

Appellee says there was "no evidence that Tumblin panicked or acted impulsively; on the contrary, after the shooting, rather than fleeing, he went into the shop's office to find more cash and items of value to steal." AB 37-38. But this actually reflects impulsive killing. Appellant may have impulsively decided to kill because he saw a chance to steal more from the office. This reasonable hypothesis negates the aggravating factor. *See Geralds v. State*, 601 So. 2d 1157, 1163 (Fla. 1992) (error to find CCP if there is reasonable hypothesis that negates aggravating factor); *Mahn v. State*, 714 So. 2d 391, 398 (Fla. 1998) (same).

Heightened Premeditation

Appellee relies on this Court's statement in *Franklin v. State*, 965 So. 2d 79, 99 (Fla. 2007), that "[l]ack of resistance or provocation by the victim can indicate both a cold plan to kill as well as negate any pretense of justification." That might be true in a case like *Franklin*, where the defendant chose the isolated victim before hand, said he was going to "get him," ordered him to the ground, and shot him in the back. But here the victim's lack of provocation undermines a finding of

heightened premeditation. Appellant said that he would kill anyone who resists; the victim did not resist, and so the killing appears to be an impulsive one.

Appellee quotes from *Hamblen v. State*, 527 So. 2d 800, 805 (Fla. 1988), that heightened premeditation "can be demonstrated by the manner of killing" and that "executions or contract murders fit within that class." AB 40. In *Hamblen*, this Court *rejected* CCP in a case similar to the one at bar. When the victim hit a silent alarm, Hamblen ordered her into the dressing room and shot her in the back of the head. In rejecting CCP, this Court cited *Routly v. State*, 440 So. 2d 1257 (Fla. 1983), as exemplifying the execution or contract murders that apply to CCP. In *Routly*, the victim was bound, gagged, and robbed, then taken by car to a remote location and shot three times (i.e., executed). *Id*. at 1260. In upholding CCP, this Court cited *Smith v. State*, 424 So. 2d 726 (Fla. 1982) as a further example of an execution style killing. *Id*. at 1265. In *Smith*, the convenience store clerk was robbed, sexually battered and taken to a wooded area where she was shot three times in the head.

Harm

To find the use of CCP harmless, this Court must determine whether there is any reasonable probability its erroneous use contributed to the death sentence. *Perez v. State*, 919 So. 2d 347, 381 (Fla.2005). CCP is one of the most "serious aggravators set out in the statutory sentencing scheme." *Morton v. State*, 789 So.

2d 324, 331 (Fla. 2001). Striking CCP leaves two aggravators: prior violent felony, and murder committed while engaged in a robbery and for pecuniary gain (merged), and substantial mitigation. Erroneous use of CCP was harmless in *Wright v. State*, 857 So. 2d 861, 878-79 (Fla. 2003), where there were three remaining aggravating factors (the murder took place after Wright committed rape and burglary, was committed to avoid or prevent a lawful arrest, and was HAC) and no valid mitigating circumstances. The case at bar is closer to *Perez*, which found the erroneous use of HAC—another weighty aggravator—was not harmless even though two aggravating circumstances remained (prior violent felony and merged aggravators of murder during robbery or burglary and pecuniary gain) and substantial mitigation.

Appellee says the error in finding CCP was harmless under *Pope v. State*, 679 So. 2d 710 (Fla.1996), which held the death sentence *proportional* where there were two aggravators, two statutory mental health mitigators and several nonstatutory mitigators. AB 41. But proportionality review and harmless error analysis are completely different. Proportionality review is a comparison of cases meant to insure that the death penalty in Florida is reserved for the most aggravated and least mitigated murders. Harmless error analysis considers the impact an error had on the decision maker, and asks whether there is a reasonable probability that the error influenced the decision to sentence to death. Regardless

whether appellant's sentence is proportional without CCP, there is still a reasonable probability the sentencing decision was affected by its erroneous use. In *Perez*, for example, this Court said the error in finding HAC was not harmless, and, given that holding, proportionality review was not required. *Perez*, 919 So. 2d at 382 n.12. Under appellee's view, however, proportionality review *would be* the harmless error analysis.

Finally, appellee relies on the trial court's statement in its order that any one of the aggravators—even, presumably, the contemporaneous robbery conviction—would outweigh the mitigating circumstances and justify the death sentence. This Court rejected such an approach to harmless error in *Geralds v. State*, 674 So. 2d 96, 104 n.15 (Fla. 1996). *Cf. Griffis v. State*, 509 So. 2d 1104 (Fla. 1987) (when appellate court disapproves ground for guideline departure sentence, resentencing required even where trial court states that it would depart for any of the departure reasons given). On this record, one cannot say beyond a reasonable doubt that the error did not affect the result. This Court should order resentencing.

POINT V THE TRIAL COURT FAILED TO PROPERLY FIND AND EVALUATE APPELLANT'S MENTAL MITIGATION EVIDENCE.

The trial court erred when it failed to find from unrefuted evidence that appellant suffers from brain damage.

Appellee says the court was free to reject the expert testimony that appellant suffers from brain damage based on three cases: *Foster v. State*, 679 So. 2d 747

(Fla. 1996); *Walls v. State*, 641 So. 2d 381 (Fla. 1994); and *Bryant v. State*, 785 So. 2d 422 (Fla. 2001). As a preliminary matter, the court did not reject the evidence of brain damage; rather it did not address it, except to note that "no competent clinical medical evidence was introduced or presented for consideration by the jury or this Court to determine whether, or the extent to which the Defendant sustained organic brain damage." R28 4042 (emphasis in original). The court erred by not making a finding on the issue of brain damage: "When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." *Deparvine v. State*, 995 So. 2d 351, 380 (Fla. 2008), *quoting Rogers v. State*, 783 So. 2d 980, 995 (Fla. 2001).

Had the court rejected Dr. Riordan's expert testimony, it would have erred. In *Coday v. State*, 946 So. 2d 988, 1005 (Fla. 2006), this Court said that a trial court's rejection of unrebutted expert testimony requires a rational basis (e.s.):

> The expert testimony from the defense could be rejected only if it did not square with other evidence in the case. **While we have given trial judges broad discretion in considering unrebutted expert testimony, we have always required that rejection to have a rational basis. For example, the expert testimony could be rejected because of conflict with other evidence, credibility or impeachment of the witness, or other reasons.** However, none of those reasons are present here. Instead, the State relies on evidence we find not in conflict with the defense evidence. Under these circumstances, the mitigating factor of inability to conform his

> conduct to the requirements of the law was reasonably established by the greater weight of the evidence and should have been considered by the trial judge as having been established.

There was no rational basis to reject the testimony that appellant suffers from brain damage. In fact the other evidence supports Dr. Riordan's testimony. Appellant has had behavioral problems since age eight; at age nine he entered the juvenile justice system. T86 5384, 5333-34. He was not a good student. He always had poor grades, and was emotionally handicapped and learning disabled. T86 5341-43. He received special education classes, most of which he failed. T86 5337. He went to a school for behaviorally disordered students. T86 5343. There was also evidence that he had had a brain injury, and the judge so found. All this evidence supported Dr. Riordan's testimony that appellant suffers from brain damage.

Appellee's cited cases are distinguishable. In *Foster*, the trial court actually found from undisputed expert testimony that the defendant "suffers some organic brain damage, is mentally retarded, and has a low IQ" and that he was "to some extent under the influence of drugs and alcohol during the murders." *Id*. at 755. The trial court, however, was not convinced that the statutory mitigator of extreme mental or emotional disturbance was established. *Id*.

In *Walls*, the trial court determined that the statutory mitigators of extreme emotional disturbance and lack of capacity to conform one's conduct to the law's

requirements were not proved. This Court called the evidence to support those mitigators "debatable", *Walls*, 641 So. 2d at 391, and wrote at 391 n.8:

> Reasonable persons could conclude that the facts of the murder are inconsistent with the presence of the two mental mitigators. Moreover, all the experts hedged their statements, gave equivocal responses, or responded to questions that themselves were equivocal. The psychiatrist said he could not testify as to Walls' state of mind at the time of the murder. One psychologist responded yes to a question that essentially only asked whether Walls was suffering any impairment at the time of the murder. The facts may be consistent with some degree of emotional impairment, which the trial court surely recognized in finding emotional handicap and brain dysfunction as nonstatutory mitigators. Nevertheless, the expert testimony does not address the true problem here: the relative weight of mitigators versus aggravators. On the whole, the facts are consistent with the conclusion that any impairment Walls suffered was nonstatutory in nature and, in any event, was of far slighter weight than the aggravating factors found to exist.

In *Bryant*, the trial court rejected expert opinion evidence that neurological impairment caused the defendant to lack impulse control and impaired judgment. However, there was conflicting evidence on this. The crime itself showed no lack of impulse control. 785 So. 2d at 435. Moreover, other experts testified that Bryant had average to above average intelligence; and his childhood friend described him as being "fairly intelligent, articulate, and able to share sophisticated ideas on theology, religion, and scriptures." *Id*. In addition, there was evidence that Bryant was a good student. *Id*. at 431. Under these circumstances, this Court found no error in rejecting the proposed mitigator as not established by the greater weight of the evidence. *Id*. at 435-36.

The trial court erred in rejecting unrefuted evidence of borderline intellectual functioning.

Appellee argues that the trial court was free to reject Dr. Riordan's testimony that appellant had borderline intellectual functioning. AB 47.

As explained in the initial brief, Dr. Riordan testified that appellant's score of 81 placed him in the borderline intellectual functioning range using the DSM-IV-TR Manual. T86 5336-37, 5405. On cross, Dr. Riordan testified that the Wechsler scale put this score in the below average range; but on redirect, Dr. Riordan explained that in the psychological community, the DSM-IV-TR is the appropriate scale. T86 5380-81; 5404-05. Appellee argues, in essence, that the court was free to substitute its opinion on the appropriate scale in the psychological community over that of the expert in the field. It cites no authority saying judges may set their own lay expertise over that of the psychologist. In fact, *Coday* teaches otherwise: there must be a rational basis to reject an expert's unrebutted opinion.

The trial court applied a test to the mental mitigation evidence rejected by the Supreme Court.

Appellee says the "weight assignment [of mitigating evidence] is reviewed under the abuse of discretion standard." AB 47. This is true, but a "trial court ruling constitutes an abuse of discretion if it is based 'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Johnson v. State*, 969

So. 2d 938, 949 (Fla. 2007), quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Here the trial court's weighing process was distorted by an erroneous view of the law. Under *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004) (per curiam), low IQ, brain damage, and other adverse mental conditions, are "inherently mitigating" and a court errs in applying a nexus test to such evidence.

In *State v. Payne*, 199 P.3d 123 (Idaho 2008), the Idaho Supreme Court held that the trial court erred under *Tennard*, and *Smith* when it applied a nexus test to the mitigation. The judge found that Payne suffered from depression, but found that did not cause him to commit the murder and was not an important factor in the case. The judge also found that his other mental mitigation did not cause him to choose to commit the crime. The state supreme court employed a standard of review identical to this Court's standard and held that the trial court erred by using a nexus standard for the mental mitigation:

> **Here, the district court did not properly weigh Payne's mental health evidence. Its opinions (both on sentencing and post-conviction relief) show that the court considered the mental health evidence only in the context of whether there was a nexus between Payne's mental health and the crimes. Yet, mental health evidence is relevant to mitigation even where there is not such a nexus.** *Smith v. Texas*, 543 U.S. 37, 45, 125 S.Ct. 400, 405, 160 L.Ed.2d 303, 311 (2004); *Tennard v. Dretke*, 542 U.S. 274, 285-288, 124 S.Ct. 2562, 2570-72, 159 L.Ed.2d 384, 395-97 (2004).

Payne, 199 P.3d at 144-45 (emphasis added; footnote omitted). *See also State v. Raines*, 653 S.E.2d 126, 139 (N.C.2007) (rejecting defense argument that judge should have *sua sponte* intervened during penalty phase because, in context, prosecutor was not arguing in violation of *Tennard* that mitigators must have nexus to crime).

Appellee relies on *Robinson v. State*, 761 So. 2d 269 (Fla. 1999), a case in which the trial court found some brain damage, but gave the mitigator little weight because there was insufficient evidence that it caused the defendant's conduct. This Court wrote (761 So.2d at 277; e.s.):

> We find no abuse of discretion in the trial court's treatment and consideration of the mitigating circumstances. Clearly, the existence of brain damage is a factor which may be considered in mitigation. *See DeAngelo v. State*, 616 So. 2d 440, 442 (Fla. 1993). Here, the experts opined that Robinson's tests results indicated the existence of brain damage. However, Dr. Lipman testified that while Robinson's particular brain deficits would interfere with his daily life, "it wouldn't be of a degree that would necessarily keep him from functioning in normal, everyday society." Further, neither expert could determine what caused the brain impairment. **Although the trial court gave little weight to the existence of brain damage because of the absence of any evidence that it caused Robinson's actions on the night of the murder, the sentencing order clearly reflects that the trial court considered the evidence and weighed it accordingly. The fact that Robinson disagrees with the trial court's conclusion does not warrant reversal.** *See James v. State*, 695 So. 2d 1229, 1237 (Fla.) (noting that "[r]eversal is not warranted simply because an appellant draws a different conclusion"), *cert. denied*, 522 U.S. 1000, 118 S.Ct. 569, 139 L.Ed.2d 409 (1997).

Robinson was decided before *Tennard* and *Smith*, and those cases call into doubt this aspect of *Robinson*. A judge can, of course, give impaired intellectual functioning *more weight* if there is a direct link between that condition and the offense. But the opposite should not be true. *Cf. K.N.M. v. State*, 793 So. 2d 1195, 1198 (Fla. 5th DCA 2001) ("Although remorse and an admission of guilt may be grounds for mitigation of a sentence or a disposition, the opposite is not true.").

It may appear there is little difference between giving mental mitigation more weight when it possesses some quality and less weight when it does not. But if judges weigh mental mitigation against some ideal form of the circumstance (here, a causal link between the mental abnormality and the crime), they are not treating the defendant as a "uniquely individual human being," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (bracket omitted), and they are not engaging in the fact-bound inquiry required by law. Judges must do what *Tennard* teaches: weigh impaired intellectual functioning with regard to its *inherent* mitigating nature. "Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Penry*, 492 U.S. at 319 (1989)(c.o.).

The sentencing order in *Robinson* showed that the judge understood the inherently mitigating nature of the defendant's brain damage. The same can't be said here. In this case, the court applied the nexus test to a broad range of mental

mitigation—even rejecting as mitigation appellant's suicide attempts and various misdiagnoses over the years because there was no evidence that these suicide attempts or misdiagnoses caused the offense. R28 4044.

Like the trial court in *Payne*, the court here did not properly weigh appellant's mental mitigation evidence. This Court should vacate the death sentence and remand for resentencing.

POINT VI THE DEATH PENALTY IS DISPROPORTIONATE IN THIS CASE.

Appellee relies on five cases to show that appellant's death sentence is proportional. AB 57-58. But these cases are distinguishable.

In *Diaz v. State*, 860 So. 2d 960 (Fla. 2003), and *Miller v. State*, 770 So. 2d 1144 (Fla. 2000), the offenses involved multiple victims. Miller bludgeoned two homeless people sleeping in a church doorway, killing one and severely injuring the other. There were two aggravators: prior violent felony and killing during attempted robbery and for pecuniary gain. And Diaz was convicted of attempted murder of his ex-girlfriend, and murder of her father. This Court found the death sentence proportionate where there were two aggravating circumstances: CCP and prior violent felony. *Id*. at 964, 970-71. Here, however, there was no CCP, as argued in Point IV.

In *Mendoza v. State*, 700 So. 2d 670 (Fla. 1997), Mendoza killed the victim during a robbery. This Court upheld the sentence based on two aggravators, prior

violent felony and homicide during attempted robbery and for pecuniary gain. But unlike appellant, Mendoza had very little mitigation.

In *Pope v. State*, 679 So. 2d 710 (Fla. 1996), the defendant brutally beat and stabbed his girlfriend for her car and money. *Id*. at 712-13. After his arrest, he said, "I hope I killed the bitch", and "I hope I didn't go through all that for nothing. I hope she's dead as a doornail." *Id*. at 712. There were two aggravators: prior violent felony and homicide committed for pecuniary gain. *Id*. at 713. On appeal, he argued his sentence was disproportionate because the killing resulted from a domestic dispute. This Court rejected the argument because there was competent, substantial evidence that Pope killed for pecuniary gain and not because of a domestic dispute. *Id*. at 716.

Finally, in *Heath v. State*, 648 So. 2d 660 (Fla. 1994), the defendant's prior violent felony was for second degree murder; proportionality was not raised as an issue on appeal, nor was it discussed by this Court.

POINT VII THE TRIAL COURT REVERSIBLY ERRED WHEN IT ALLOWED APPELLANT TO CHOOSE PENALTY PHASE WITNESSES, A CORE FUNCTION OF AN ATTORNEY.

Appellee argues that this issue was not preserved for appellate review by objection. AB 59-60. No case says it must be. This is one of those situations—like a guilty plea or waiver of counsel—where a trial court has an *affirmative duty* to

inquire. *See Koenig v. State*, 597 So. 2d 256, 257-58 (Fla. 1992) (guilty plea); Morgan v. State, 991 So. 2d 984, 987 (Fla. 4th DCA 2008) (waiver of counsel).

Appellee argues that *Boyd v. State*, 910 So. 2d 167 (Fla. 2005), and *Mora v. State*, 814 So. 2d 322 (Fla. 2002), apply and require affirmance. AB 60. Appellant asserts that *Mora* does not apply, but that *Boyd* does, and it requires reversal.

Mora did not want his lawyer to investigate mitigation regarding his family in Spain because he did not want his "quite elderly and weak" relatives to learn of his plight, and he "felt compelled to protect his family". *Id*. at 331. The judge initially concluded that, under *Koon v. State*, 619 So. 2d 246 (Fla. 1993), Mora either had to either let counsel contact his family or discharge counsel and proceed pro se. 814 So. 2d at 331. The judge also initially ruled that Mora would proceed pro se, but did not make the inquiry required by *Faretta*.

When penalty proceedings began, however, the judge decided that Mora was not competent to represent himself, re-appointed counsel and ordered him to contact the family in Spain. Mora protested that counsel should not take direction from the court, and the court again discharged counsel. Mora refused to participate in the penalty proceedings, and no witnesses were called. 814 So. 2d at 332.

This Court held that the judge had erred in believing *Koon* imposed a "prohibition against waiving any possible mitigation without counsel's full investigation of all possible mitigation." *Id*. It wrote that *Koon* serves "to ensure

that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence". *Id*. at 333. Mora wanted only to waive the mitigation regarding elderly family members in Spain, was aware of their potential testimony, and "was not requesting a waiver of other mitigating evidence", and hence the judge erred in making him choose between the investigation or proceeding without counsel. *Id*. at 333.

In contrast to *Mora*, the record here does not show the nature of the mitigation that appellant was waiving, nor his reasons for waiving it. And of course this case did not involve a court compelling a defendant to choose between foregoing mitigation investigation and foregoing counsel.

Appellee says that under *Boyd* a colloquy "is not necessary before a defendant waives mitigation evidence so long as counsel does not suggest that the waiver is unknowing or involuntary" and that a "colloquy may become necessary only where defense counsel informs the court of a disagreement with his client's decision and has a suspicion that the defendant is not making a proper waiver." AB 63.

It is difficult to tell what rule appellee thinks applies. So far as it says no on-the-record colloquy is required unless counsel disagrees with the decision *and*

questions the client's ability to make it, appellee is wrong. Such a rule is not supported by *Boyd*, and it would violate the Rules Regulating the Florida Bar.

Through its bar rules, this Court requires lawyers to perform competently. R. Regulating Fla. Bar 4-1.1. Where attorneys feel they cannot perform competently because of the defendant's wishes, they must bring the matter to the court's attention, and the court must make a thorough inquiry. The best rule (discussed below) would be for the judge to simply direct counsel to proceed in accord with counsel's professional judgment and leave to the client only the most fundamental decisions (whether to waive jury, counsel, or the right to a trial, etc.), although this Court does not need to reach such a rule to decide this case.

Appellee says the colloquy satisfied *Boyd*. AB 64. Appellant disagrees. In *Boyd*, the judge "inquired about the mitigation issue several times" and was "aware of the potential mitigation evidence available for Boyd." *Id*. at 188. And at the start of the penalty phase the judge again "interviewed Boyd on the issue of what mitigation was to be presented and determined that he *understood the potential consequences of his decision*, that his decision was deliberate, and that he made the decision freely and voluntarily". *Id*. at 187-88 (e.s.). *See also Hojan v. State*, No. SC05-1687, at 10-11 (Fla. Feb. 27, 2009) ("Hojan expressly and repeatedly waived his right to present mitigating evidence on numerous occasions"; his "refusals

involved over twenty separate affirmations that occurred over the course of several months and multiple trial dates.").

The court's colloquy did not meet the standard set by *Boyd* and *Hojan*. Aside from the identity of the witnesses (appellant's mother and sister), the court was not aware of the mitigation available for appellant, or of his reasons for waiving it; it did not interview him on what mitigation was to be presented; or determine that he understood the potential consequences of his decision.

Appellee ignores another defect in the colloquy: appellant was not apprised of the perils of self-representation. *See Brooks v. State*, 703 So. 2d 504 (Fla. 1st DCA 1997); *Madison v. State*, 948 So. 2d 975 (Fla. 1st DCA 2007).

Appellee says appellant is arguing that "he was not permitted to decide which witnesses to call at sentencing[,]" a position contrary to *Boyd*. AB 60. Although this Court need not reach this issue—as explained above, the trial court did not comply with *Boyd—Boyd* should be limited to its facts.

Appellant respectfully submits that *Boyd* goes too far in respecting the autonomy interests of the defendant without putting in the balance the interests of the court and counsel, and this uneven balancing of interests promotes a somewhat illusory view of the client's dignity that distorts the sentencing process to the

extent that it may undo the state and federal constitutional rights of counsel, due process and not to suffer cruel and unusual punishment.[6]

The courts have an interest that the trial produce the truth and a just outcome. *See Kolker v. State*, 649 So. 2d 250, 252 (Fla. 3d DCA 1994) ("[T]he trial court has an institutional interest in protecting the truth-seeking function of the proceedings over which it is presiding by considering whether the defendant has effective assistance of counsel, regardless of any proffered waiver [of conflict-free counsel]."). This interest is not served by the suppression of important mitigation, even by the defendant. The courts also have an interest in the competent and effective representation of defendants by counsel, whose professional conduct is regulated by this Court. This interest is not served by treating counsel as a sort of appendage of the defendant's will. *See Dickey v. McNeal*, 445 So. 2d 692, 696

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[6] See Christopher M. Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Injury*, 93 Ky. L.J. 39, 118 (2005) (concluding that "thus measured, the community's collective interest in a just outcome must outweigh the defendant's separate interest in autonomy—in the power to influence the outcome."). *Cf. Indiana v. Edwards*, 128 S.Ct. 2379, 2387 (2008) ("[A] right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."); Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, B.Y.U. L. Rev. 307, 337 n. 218 (1997) ("**The attractiveness of the autonomy view can stem from its denial of responsibility and that is a substantial problem.**"); Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 Hofstra L. Rev. 479, 491 (2007) ("**So-called client-centered lawyers can do damage to their clients by 'simply acquiesc[ing]' to their foolish wishes. This is an abdication of professional duty out of a 'false sense of respect for [client] autonomy.' It can also be a cover for laziness, for being afraid to really engage with a client, or worse**.")(e.s.).

(Fla. 5th DCA 1984) (counsel is not bound by client's decision to forego trial preparation: "No competent and ethical attorney, privately retained, would accept such a restriction. Neither, then, should appointed counsel. An appointed counsel must not be a captive counsel bound by the legal stratagems of his client."). Appellee's brief proposes an unthinking adherence to *Boyd* to the detriment of the court's interests.

A court must respect counsel's independence and professional judgment at least as much as it respects the defendant's wishes to control the litigation beyond the basic issues of whether to plead guilty, have a trial by jury, and be represented by counsel.[7] Again, appellee fails to consider such interests.

If this Court accepts appellee's argument to apply *Boyd* beyond its facts, then, to truly respect individual autonomy, the defendants must make that decision with eyes wide open. The court must: (1) inform defendants of what mitigation they are giving up; (2) make sure they understand they don't have to give it up; (3) establish whether they are fully informed about the potential consequences of giving it up, and (4) conduct a *Faretta* inquiry and make sure that the defendant is

[7] Lawyers must "exercise independent professional judgment" in representing clients. Rule 4-2.1, R. Regulating the Florida Bar. Under Rule 4-1.2(a), counsel "shall abide" by the client's decision "as to a plea to be entered, whether to waive jury trial, and whether the client will testify." *See also Jones v. Barnes*, 463 U.S. 745, 753, n. 6 (1983) (quoting ABA Model Rules of Professional Conduct). The Comment to Rule 4-1.2(a), provides that counsel "should assume responsibility for technical and legal tactical issues" and may not enter into an agreement to fail to provide competent representation as required by rule 4-1.1.

competent to make this decision and is aware of the dangers and disadvantages of making it. Anything less will not affirm the values of individual autonomy and human dignity and will denigrate the separate interests of the courts and of counsel. And this rule will protect another important value: the fair application of the death penalty to those who have committed the most aggravated and least mitigated crimes rather than to those who have exhibited the least judgment at sentencing.

CONCLUSION

This Court should reverse the judgment and sentence and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by courier this _____ day of March, 2009.

_____
Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2), this_____ day of March, 2009.

_____
Paul E. Petillo
Assistant Public Defender