IN THE SUPREME COURT
STATE OF FLORIDA

DOUGLAS BLAINE MATTHEWS,

Appellant,

vs. CASE NO. SC10-1771

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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POINT VI: IN REPLY TO THE ASSERTION MADE BY THE APPELLEE THAT APPELLANT'S SENTENCE OF DEATH IS PROPORTIONATE TO OTHER CASES WHERE THE DEATH PENALTY HAS BEEN UPHELD BY THIS COURT

In its brief, the Appellee asserts that Appellant's sentence is proportionate to other cases wherein a sentence of death has been affirmed by this Court. See Answer Brief of Appellee, pages 48-52. Appellant must respectfully disagree.

As this Court observed nearly 40 years ago in State v. Dixon, 283 So 2d 1, 7 (1973), cert. denied, 416 U.S. 943 (1974), the ultimate sanction is unique in its finality and in its total rejection of any possibility of rehabilitation. Proportionality review is designed to protect those convicted of the most serious of crimes from suffering the harshest punishment, that of death, in those instances where the penalty of life imprisonment will suffice. Id. In order to promote uniformity of sentencing in death penalty proceedings, proportionality review is that necessary "final step" in a process designed to ensure that the death penalty is reserved "for only the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d at 8.

As acknowledged by this Court in Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998):

> Proportionality review "requires a discrete analysis of the facts," Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.

Much more than a counting process, this two-part analysis determines whether a capital murder is among the most aggravated and also falls within the category of the least mitigated of crimes. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

Appellee characterizes Appellant's case in mitigation as "weak." See Answer Brief of Appellee, page 49. Although it may fairly be argued that Appellant's murder of Kurt Zoeller was aggravated, it should not be concluded that his crime is one of the least mitigated in this Court's extensive history of mandatory review.

In the instant case, the trial court found four aggravating circumstances. However, one of these was assigned little weight and the other was assigned significant weight only when combined with another aggravator which involved the same circumstance of the crime.

Without dispute, the most compelling mitigation in Appellant's case, whether statutory or nonstatutory, and whether assigned great, significant, merely some or slight weight, demonstrates several recurring themes. Most notably, as determined by the trial court, Appellant struggled with diagnosed (or improperly diagnosed) mental health conditions such as Attention Deficit Hyper Activity Disorder and bipolar disorder throughout most of his life. Although the trial court found both statutory mental health mitigators to be applicable to the Appellant's crime, the court unfortunately failed to afford them sufficient weight.

In addition, a long history of illegal substance abuse, including marijuana, cocaine and hallucinogenics on the night of the murder, undoubtedly aggravated these significant mental abnormalities. Moreover, a series of head injuries beginning with a traumatic birth and including a childhood bicycle accident and being severely beaten with a brick, suggest brain damage.

In Green v. State, 975 So. 2d 1081 (Fla. 2008), this Court noted that it has consistently recognized "substantial and uncontroverted evidence" pertaining to a defendant's mental illness to be "among the most compelling" mitigation. In Crook v. State, 908 So. 2d 350 (Fla. 2005), the defendant's death sentence was overturned by this Court based upon substantial mental mitigation related to the circumstances of Crook's crime. As in the instant case, Crook's victim also suffered "multiple stab wounds and significant head injuries." Crook v. State, 813 So. 2d 68, 69 (Fla. 2002).

In Offord v. State, 959 So. 2d 187 (Fla. 2007), this Court reduced the defendant's death sentence to life imprisonment in spite of the existence of the heinous, atrocious, and cruel (HAC) aggravator. In that case, the murder victim, Offord's wife, was stabbed repeatedly in the face and chest before being bludgeoned to death by fifty blows with a claw hammer. Like the Appellant, Offord suffered the affliction of bipolar disorder. Despite a unanimous jury recommendation in favor of the death penalty and the imposition of a sentence of

death by the trial court, this Court concluded that the defendant in that case should be spared the ultimate punishment for what this Court characterized as an unquestionably "brutal murder." Offord v. State, 959 So. 2d at 193. Despite the defendant's testimony during his Spencer hearing that he did not think he was crazy and that he could "fool any doctor" any day of the week, this Court still determined Offord's mental health mitigation to be "uncontroverted". Id.

In Larkins v. State, 739 So. 2d 90 (Fla. 1999), a sentence of death was vacated because mental health mitigation was determined by this Court to outweigh the prior violent felony and pecuniary gain aggravators. In that case, this Court characterized the murder as having "resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces." Larkins v. State, 739 So. 2d at 95. The same can be said of the Appellant.

Not unlike the defendant who "freaked out" and stabbed his drinking buddy seventeen times in Nibert v. State, 574 So. 2d 1059 (Fla. 1990), the Appellant simply "snapped." Notably, in Morgan v. State, 639 So. 2d 6 (Fla. 1994), a death sentence was reduced to life despite a finding by the trial court in that case that the defendant's rage and mental infirmity were not significant factors in the murder. Finally, in Kramer v. State, 619 So. 2d 274 (Fla. 1993), this Court vacated a death sentence which was supported by both the HAC and prior violent felony aggravators. This Appellant deserves similar consideration by this Court.

Appellant does not mean to minimize the seriousness of the crime for which he was convicted. Every capital murder is by definition a heinous crime. Green v. State, 975 So. 2d at 1089. Nevertheless, on this record, this Court should not conclude that Appellant's crime is either one of the most aggravated or one of the least mitigated among first-degree murders. Consequently, Appellant's death sentence should be vacated and the case remanded for the imposition of a life sentence without the possibility of parole.

CONCLUSION

Based upon the arguments presented and authorities cited herein, Appellant respectfully requests that this Honorable Court reverse his sentence of death and remand the case to the trial court with instructions consistent with this Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellee has been furnished by U. S. Mail delivery to Office of the Attorney General, 3705 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013 this _____ day of May, 2012.

_____
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CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of font used in this brief is 14 point Times New Roman.

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