IN THE SUPREME COURT OF FLORIDA

TERRY MARVIN ELLERBEE JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. **SC10-238**
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

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

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ARGUMENT

POINT I

APPELLANT WAS DENIED DUE PROCESS; HIS RIGHT TO A JURY TRIAL, AND EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL PRESENTED AN INVALID DEFENSE TO FELONY MURDER.

Appellee does not dispute that an accidental shooting is not a defense to felony murder. Nor does Appellee dispute that even if defense counsel had convinced the jury that the shooting was accidental, or during flight after the burglary, the jury would still have to convict Appellant of felony murder. In fact, felony murder was created to make one liable for an accidental killing during an enumerated felony--even if the killing occurs during flight. As explained in pages 28 -- 30 of the Initial Brief, by merely claiming that the killing was an accident—counsel deprived Appellant of his right to a true adversarial testing of the felony murder charge.

Appellee claims that the failure to present a defense to felony murder is not apparent from the face of record because defense counsel used the strategy of conceding guilt. However, defense counsel never conceded guilt -- he claimed that Appellant was not guilty of felony murder because the killing was accidental. It is not a strategy to fail to understand that an accidental shooting is not a defense to felony murder. Nor is it a strategy to **fail to understand** that a killing during a

flight from an enumerated felony is not a defense to felony murder. Contrary to Appellee's claim—the situation here is very, very rare-- See Chandler v. Illinois, 543 N.E.2d 1290 (Ill. 1989)—opposed to cases where counsel uses a strategy.

Appellee also claims that defense counsel had adversarily tested felony murder by cross examination and attacking witnesses, such as Amber Reed, and by challenging the State's case in closing argument. Appellee specifically claims defense counsel challenged felony murder because the felony was completed at the time of the shooting. This is contrary to Appellee's claim that defense counsel's strategy was to concede guilt. More importantly, Appellee overlooks that the shooting was in the course of the felony even when it was during flight after the felony. Thus, such a defense is per se invalid, contrary to the jury instructions, and does not adversarialy test felony murder. Cross-examination of witnesses and challenging the State's closing argument regarding whether the shooting was accidental does not adversarily test felony murder **where defense counsel implored the jury to acquit based on an invalid theory of defense for felony murder.**

Appellee claims that defense counsel deliberately chose the strategy of conceding guilt of felony murder in light of overwhelming evidence of guilt. Again, defense counsel did not concede guilt. Furthermore the evidence was far from overwhelming. The State had proof Appellant was at the scene, but as far as

premeditation and felony murder there were serious doubts about the State's case. Defense counsel challenged premeditation and felony murder. However, **defense counsel used an invalid theory of defense as to felony murder.**

Appellee claims that if defense counsel had not conceded guilt of felony murder he would lose all credibility with the jury. The problem with Appellee's argument is that defense counsel did not concede felony murder. Instead, defense counsel challenged felony murder based on an invalid defense which was contrary to the jury instructions. See page 29 of the Initial Brief. Thus, **counsel would actually lose credibility by offering an invalid defense to the jury which would be contrary to the jury instructions the jury was to receive.** This was not a situation where defense counsel conceded guilt so as to gain credibility during the penalty phase when arguing life should be imposed—instead, counsel used an invalid theory of defense to contest guilt and would have little or no credibility with the jury during the penalty phase. Appellee's argument regarding strategy totally lacks merit.

Appellee argues that this issue should be reviewed pursuant to Strickland v. Washington, 466 U.S. 668(1984) and not under United States v. Cronic, 466 U.S. 648(1984) which presumes prejudice where a charge by the government is not adversarialy tested. However, Appellee gives no explanation how felony murder was tested by defense counsel. Appellee merely points to where premeditation was

tested. It can't be said felony murder was tested by use of an invalid defense. Defense counsel's failure to legitimately test felony murder was complete. Regardless, as argued in the Initial Brief reversal is warranted under either the Strickland or Chronic standards.

Appellee claims that counsel's ineffectiveness for conceding guilt must be examined under Nixon v. State, 932 So.2d 1009 (Fla. 2006) and Harvey v. State, 946 So.2d 937(Fla. 2007). However, Nixon and Harvey involved a **strategy to concede guilt**. Those cases are inapposite to the instant case where defense counsel **did not concede guilt** and instead sought acquittal based on an invalid defense to felony murder. Appellee does not dispute the reasoning or rational of Chandler v. Illinois, 543 N.E.2d 1290 (Ill. 1989). Instead, Appellee merely says it is **foreign** and is much different than cases such as Harvey and Nixon where counsel conceded guilt. Illinois is not France. More importantly, as explained at pages 32 -- 35 of the Initial Brief this case is similar to Chandler in that defense counsel did not concede guilt – but mistakenly believed a defense to felony murder which does not actually exist. The appellate court in Chandler found the error to be apparent on the face of the record and **reversed a death penalty case on direct appeal.**

Finally, Appellee claims that defense counsel had no other choice but to concede guilt to felony murder because there were no possible defenses to felony

murder. However, there were potential defenses. For example, defense counsel could have argued that there was considerable doubt as to what occurred before, during, and after the shooting so as to create a reasonable doubt as to felony murder. But defense counsel did not do so and instead relied on a nonexistent defense. Another example is provided in the Initial Brief at pages 34 and 35 where defense counsel could have used a defense to negate burglary which in turn would negate felony murder such as a necessity defense. As explained on page 35 of the Initial Brief Appellant was in a desperate situation starving in desperate need of food and supplies for a baby that was just a few weeks old. This could have been used as a necessity defense to the burglary. Appellee counters this defense by saying while there was other evidence to support that Appellant created this situation. Appellant agrees there could be two sides to this claim. But the issue is not whether the best defense was provided. The issue is whether any legitimately recognized defense was offered to adversarialy test felony murder. Defense counsel offered no valid defense. Reasonable doubt and necessity are legally recognized defenses to felony murder. Accident is not. Offering an invalid defense, such as an accidental shooting or that the shooting occurred during an escape from burglary does not adversarialy test felony murder. Appellant relies on his Initial Brief for further argument on this point.

POINT II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THAT THE KILLING WAS COLD, CALCULATED, AND PREMEDITATED.

Appellee correctly acknowledges the trial court's finding of CCP must be supported by competent substantial evidence. See also Diaz v. State, 860 So.2d 960, 965 (Fla. 2003). As explained on pages 38 through 41 of the Initial Brief the trial court's finding is not substantial, competent evidence of CCP. Appellee does not dispute this. In fact, Appellee essentially concedes the trial court was wrong in its finding of CCP but should be upheld based on the "right for the wrong reason" (i.e. tipsy coachman) doctrine. Appellee's brief at 37 note 4. **Appellee is asking this court to review findings that the trial court never made.** Appellee is asking this court to review **Appellee's own version** of the facts given at pages 33 through 37 of its Answer Brief. However, it is the findings of the trial court-- and not Appellee-- that this court reviews. See Diaz v. State, 860 So.2d 960, 967 (Fla. 2003). If it was the **State's findings** that were to be reviewed-- the requirement of the trial court making findings could be eliminated.

In addition, even Appellee's own findings do not support CCP. Appellee reaches its conclusion regarding CCP by improperly considered evidence of compelled mental health evidence and by stacking and pyramiding inferences.

For example, on page 35 of its brief Appellee emphasizes that Appellant's compelled mental health evaluation with Dr. Landrum showed Appellant had a plan to kill :

> He told Landrum that he would have killed Dellarco if he had been offered a ride with him, *before he ever entered the house* [T24 2523]. It is apparent from Ellerbee's own words, apart from his self-serving statements that the killing was an accident, that he had intended to kill Dellarco when he went to the house that day. He had a plan.

It is patently improper for Appellee to use compelled mental health evidence to support an aggravating circumstance. See Florida Rule of Criminal Procedure 3.202(d) (results of a compelled mental health evaluation are limited to rebutting defense mitigation). [1] The trial court did not use this compelled mental health evidence in order to support CCP. This improper use of evidence by Appellee is another reason that the trial court's order-- rather than Appellee's version of facts-- is reviewed by this Court in a death penalty case. Appellee's improper use of the evidence shows the lack of credibility in its CCP argument.

Furthermore, Appellee's hypothesis of CCP is also based on circumstantial evidence by stacking or pyramiding of inferences. In order for evidence to be

[1] In addition, use of compelled mental health evidence to build evidence against a defendant for guilt or aggravation rather than merely rebutting mental mitigation would violate the Fifth Amendment right against self-incrimination. Also, the mental health expert's task is to review the defendant's mental status and not to record facts of the case.

sufficient for either guilt or aggravators (such as CCP) there must be substantial competent evidence rather than a stacking or pyramiding of references. See Miller v. State, 770 So.2d 1144, 149 (Fla. 2000) (circumstantial evidence test guards against basing a conclusion on stacked inferences); Collins v. State ,438 So.2d 1036 (Fla. 2nd DCA 1983)(pyramiding of inferences lacked the conclusive nature to support finding). Appellee's stacking and pyramiding of inferences will be discussed below.

Appellee infers that Appellant procured a number of weapons in advance specifically to kill Dellarco. The trial court did not make this finding. Moreover, the evidence showed that Appellant always had guns and not that he procured them to kill Dellarco. CCP is not present merely because weapons are brought to the scene. See e.g., Rogers v. State, 511 So.2d 525 (Fla. 1987)(CCP stricken where two .45 automatic handguns were brought to scene); Wyatt v. State, 641 So.2d 1336 (Fla.1994); Compare Bell v. State, 699 So.2d 674,677(Fla. 1997) ("Bell told people he planned to kill Theodore Wright and he purchased a gun for that purpose"). Burglary and robbery cases involving stores and residences are not converted from felony murder cases to heightened premeditation cases because weapons are brought to the scene. Also, having multiple weapons does not prove CCP. It depends on the facts of the case. Appellee claims that Appellant was carrying too many weapons for anything other than a plan to kill Dellarco.

However, it would only take one weapon to kill Dellarco. Obviously, the other weapons[2] had other significance. [3] For example, it must be considered that Amber Reed had a drug problem and was highly volatile –it would be logical to conclude Appellant would not want to leave the weapons around her and her baby for worry of suicide or an accident. Also, if Appellant was worried about being attacked by dogs during a burglary he might rely on more than one weapon if threatened by numerous dogs(as Dellarco owned). The bottom line is that multiple weapons does not prove CCP. It's pure speculation that Appellant was bringing weapons to kill Dellarco.

Appellee also infers CCP based on an assumption there was a lack of provocation. The trial court did not find lack of provocation. Appellee misconstrues provocation. Provocation in this context is not the same as in a self-defense case (meaning excuse or justification). Rather, it relates to causation. Although Dellarco did nothing to justify being shot – it was Dellarco's return

[2] Appellee claims Appellant "specifically took the revolver with him that day to shoot the head dog" citing XIX 1801. Such is not true. Appellant said he had "that the (inaudible for the **dogs**" XIX T1801. Furthermore, the only evidence was Appellant shot the dog because it attacked or was aggressive toward him. XVIII 1713, XIX 1779.

[3] Appellee emphasizes that the rifle had a scope. This goes against CCP rather than supporting CCP. The shot was fired inside the house rather than at a distance like a sniper. A well-planned in house shooting would not involve a scope. Rather, the choice of an unyieldly weapon looks unplanned.

and/or use of a phone which served as provocation. Thus, there was not a lack of provocation in this case.

Appellee infers that Appellant had a motive to kill Dellarco because he had wanted to live in Dellarco's house-- and this is based on an inference that Appellant had a "dream" to live in houses on the prairie. At best, there were inferences presented that Appellant had planned to burglarize houses and businesses six months prior to the shooting. Apparently, all past plans had been abandoned. There was no evidence of any present plan. Moreover, there was no prior plan to kill. The statements made **after** the killing about being able to live in the house did not show a **prior plan** to kill-- but merely shows that **after** the killing Appellant knew there was a place available to live. All the statements referred to **after-the-fact plans** and none referred to plans prior to the killing. Thus, these inferences do not prove CCP.

Appellee infers that Appellant was "casing" the Dellarco residence weeks prior to the shooting. At page 35 of its brief Appellee points to XXIV T2524 to support such an inference. However, this again is the compelled mental health evidence which cannot be used to prove aggravating circumstances. Rule 3.202(d). Again, the trial court did not find casing or use such evidence. In addition, Appellant did **not** tell Dr. Landrum he had been casing Dellarco's house for weeks—rather he indicated he had been watching immediately prior to

approaching Dellarco. There is a huge difference. Moreover, even if Appellant had been casing the house-- this does not indicate a plan to kill—it is just as consistent with a plan to steal while the occupant was not at home.

Appellee next infers that after Appellant and Amber Reed were kicked out of their residence that Appellant "set out" for the Dellarco residence. The trial court did not use this inference. Moreover, there is no evidence to support this. In fact, Appellant and Reed set out for Red Camp and that's where they ended up – and not at the Dellarco residence. Appellee's inferences are contrary to the evidence. Moreover, Appellee's theory that Appellant was reacting out of anger after being kicked out of the residence is contrary to the coldness requirement for CCP. Most importantly it does not show a plan to kill Dellarco.

Appellee also infers a plan to kill because Appellant hid until Dellarco left and then went in the house. However, this is more consistent with a planned burglary than a planned killing. Logically one would wait for the occupant to leave before he committed the burglary. If there was a plan to kill—why not kill when Dellarco was present in the rural area with no one around-- rather than wait for Dellarco to leave and possibly return with other people.

Appellee claims Appellant's later excuse to Amber Reed for being late was evidence that he waited for Dellarco to return in order to kill him. The trial court did not use this. Appellee misconstrues Reed's testimony. Reed testified that

Appellant lied to her about needing to return a man's truck by 9:00 – and that it took until 9:00 because Appellant had to wait for the man to return :

Q …. I want to jump back momentarily to when he came back with that blue Ford Explored the night before. Did he give you any explanation as to where he got that vehicle from?
A He said he had met the man before and he told the man that his truck had broken down and he needed to get into town to get some parts for it and he would have the man's truck back by 9:00.
Q Now, you knew this to be a lie because you had Ms. Hutchinson's vehicle; is that correct?
A Yes.
Q Did he tell you anything about why it took him so long?
A He said he had to wait for the man to get home.

XVIII T1714. Thus, Reed's testimony about returning late was in the context of Appellant lying—and not an admission that he waited for Dellarco in order to kill him. It appears at best to indicate that Appellant waited in order to obtain the car or rob. It could just be a lie to Reed as to why Appellant was late. Again, it is not an admission of a plan to kill.

Appellee infers that Appellant aimed the firearm at Dellarco. The trial court did not use this inference. Moreover, there was no evidence, even in Appellant's statement, that he aimed a gun at Dellarco. Appellee points to the fact that Appellant leaned against the doorjamb as proving that the killing was planned. However, one could lean against the doorjamb to prevent kick back from the rifle and this does not show he was deliberately aiming at Dellarco.

Appellee infers that because of Appellant's experience with guns that the shooting had to be planned. The trial court did not use this inference. Moreover, there is no nexus between planning and gun experience. Experience with guns does not mean one is good with a gun in a stressful situation such as potentially being discovered during a break-in. Under stressful situations one can shoot where one does not intend to shoot.

Appellee also infers that Appellant carried out his plan to live in the residence by returning to the residence to let out dogs. The trial court did not use this inference. Moreover, there is no evidence Appellant returned to live in the residence. In fact, the evidence is to the contrary and shows that he didn't live in the residence. If he returned he could have been returning to steal or to clean up evidence. He also could return just to take care of the dogs.

The basis for Appellee's CCP claim is based on stacking and pyramiding inferences – and even based on misinterpretation of facts. This is another reason why the trial court's findings should be reviewed instead of Appellee's hypothesis. Appellant relies on his Initial Brief with regard to the trial court's ruling on CCP.

Finally, Appellee has not addressed Appellant's harmless error argument on page 46 of the Initial Brief. Instead Appellee claims the error is harmless based on Pope v. State, 679 So.2d 710, 716 (Fla.1996) which doesn't deal with the

elimination of CCP as an aggravating circumstance. Appellee's claim is without merit. Appellant relies on his Initial Brief for further argument on this point.

POINT III

THE DEATH PENALTY IS NOT PROPORTIONALLY WARRANTED IN THIS CASE.

Appellee essentially claims that proportionality review is a determination whether the trial court abused its discretion in imposing the death sentence. Proportionality review is a device to compare cases to ensure that the death penalty imposed evenhandedly. A trial court's discretion as to sentencing and weighing in a Florida capital case is extremely limited otherwise Florida's death penalty would be arbitrary and capricious (thus unconstitutional). Proffitt v. Florida, 428 U.S. 242, 258 (1976) (although factors cannot be given "numerical weights" Furman requires that sentencing authority's weighing discretion is "guided and channeled"). Proportionality review "requires a discrete analysis of the facts" and entails a "qualitative review" by this Court. Bell v. State, 841 So. 2d 329, 331 (Fla. 2002). In other words, this Court's proportionality review does not take back seat to an individual trial judge's so-called unbridled discretion as essentially advocated by Appellee. Appellee does not try to analyze proportionality under the test that the death penalty is reserved only for the "most aggravated" and "least mitigated" of murders. E.g., Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

Appellee extensively quotes the trial court's order at pages 42 -- 48 of its brief and emphasizes that a trial court has discretion as to facts. However, as

explained above, this Court's proportionality review is designed to reduce differences in cases due to a trial judge's subjective variances and weighing facts and aggravation and mitigation. In establishing proportionality review this Court stated:

> When the sentence of death has been imposed, it is this Court's responsibility to **evaluate anew** the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate. State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Harvard v. State, 375 So. 2d 833, 834 (Fla. 1977) (emphasis added). A trial court does not have to abuse its discretion for the death penalty to be disproportionate. Interestingly, despite claiming deference to the trial court's hypothesis as to what occurred -- Appellee ignores or rejects it and creates its own hypothesis as to what happened at page 49 of its brief.

In the Initial Brief, Terry v. State , 668 So.2d 954 (Fla. 1996) is cited to explain that where the circumstances of the actual shooting are unclear -- the death penalty is disproportionate. In this case the evidence as to the actual shooting comes from Appellant's statements which show an accidental shooting. Appellee does not dispute that the death penalty would be disproportionate under those circumstances. Instead, Appellee claims the facts are clear that this was a lay-- in --wait killing thus making the death penalty proportionate. First, the death penalty

may be disproportionate in lay—in--wait killings. See Besaraba v. State, 656 So.2d 441(Fla.1995); Almeida v. State,748 So.2d 922,925,926(Fla.1999)(death disproportionate where Almeida waited for victim in parking lot until 4:30 a.m.). Moreover, this was not a lay—in—wait killing. Appellee's claim is based on Appellant waiting for Dellarco to leave and then waiting for him to return, bringing multiple weapons to the scene, and being experienced with guns. Appellee's conclusion that these facts prove the actual shooting was lay—in-- wait shooting is, at best, speculative.

The fact that Appellant hid until Dellarco left and then went in the house does not show that Appellant had planned a lay—in—wait killing. It is more consistent with a planned burglary than a planned killing. Logically one would wait for the occupant to leave before he committed the burglary. If there was a plan to kill—why not kill when Dellarco was present in the rural area with no one around-- rather than wait for Dellarco to leave and possibly return with other people.

Carrying a number of weapons does not prove a lay—in—wait killing. There was no indication Appellant ever left weapons with Amber Reed. Appellee claims that Appellant was carrying too many weapons for anything other than a plan to kill Dellarco when he returned. However, it would only take one weapon to kill Dellarco. Obviously, the other weapons had other significance. For example,

it must be considered that Amber Reed had a drug problem and was highly volatile –it would be logical to conclude Appellant would not want to leave the weapons around her and her baby for worry of suicide or an accident. The weapons do not prove a lay—in—wait killing.

Appellee infers that because of Appellant's experience with guns that the killing was a lay—in—wait killing. However, there is no nexus between planning and gun experience. Moreover, experience with guns does not mean one is good with a gun in a stressful situation such as potentially being discovered during a break-in. Under stressful situations one can shoot where one does not intend to shoot.

Appellant is not positing that his statement that the shooting was accidental must be taken as true. However, absent the statement, it is pure speculation as to what happened during the actual shooting. Thus the death penalty is disproportionate in this case. Terry, supra.

Despite this Court's admonition that proportionality review is not merely counting aggravating and mitigating circumstances -- Appellee merely counts to claim death is proportionate in this case. Even using the wrong review, Appellee's comparison of cases is flawed.

The cases cited by Appellee at pages 50 -- 51 of its brief involve much more egregious situations and egregious aggravation. For example in Johnson v. State,

660 So.2d 637 (Fla. 1995) two of the most egregious aggravators are present -- HAC and prior violent felony -- neither which is present in this case. Also, contrary to Appellee's implied assertion -- the facts were very different from this case where there the victim was first strangled inside her house and then stabbed outside her house. In addition, **every single case cited by Appellee involves the prior violent felony aggravator[considered one of the weightiest aggravators-** **Sireci v. State , 825 So.2d 882,887 (Fla. 2002] which is not present in this case and also the facts of each case is more egregious than in the instant case**:

Hunter v. State ,660 So.2d 244(Fla. 1995)— Prior violent felony and shooting of four men face down on sidewalk.

Mendoza v. State, 700 So.2d 670,672(Fla. 1997)—Prior violent felony and "three of the four shots that hit Calderon(victim) were from point blank range"-not a single shot killing as Appellee claims.

Diaz v. State, 860 So.2d 960(Fla. 1993)—CCP and Prior violent felony—but case without precedential value where only 3 of 7 justices joined in the opinion (3 dissents and one concur in result only).

Miller v. State, 770 So.2d 1144 (Fla. 2000)—Prior violent felony and Miller beat two people savagely with a pipe- one died where pipe fractured skull and penetrated into brain—other victim had several fractured ribs, a broken arm , and broken fingers.

Heath v. State, 648 So.2d 660(Fla. 19940)—Prior violent felony and first stabbed victim and then shot two times in head.

Pope v. State , 679 So.2d 710(Fla. 1996)-Prior violent felony and victim first beaten then stabbed then repeatedly kicked in head with cowboy boots before she died.

Appellant relies on his Initial Brief for further argument on this point.

POINT IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING CIRCUMSTANCE THAT THE VICTIM WAS PARTICULARLY VULNERNABLE DUE TO ADVANCED AGE OR DISABILITYY.

Appellee devotes the majority of its discussion raising the strawman argument that the trial court's failure to find an aggravating circumstance controls whether to instruct the jury on that circumstance. **This is not Appellant's argument** -- Appellant's argument is that, regardless of the trial court's finding or ruling, the evidence in this case did not support that the victim was particularly vulnerable due to advanced age or disability.

Appellee claims that disparity or advanced age by itself is sufficient for this aggravating circumstance. This is not true. See Francis v. State , 808 So.2d 110(Fla. 2001).

Appellee does not dispute that Dellarco was taking care of himself and six dogs and was able to drive on the day of the shooting. In fact, the only evidence, direct or circumstantial, was that Dellarco was moving and acting consistently with good health -- despite possible past health problems. There was no indication these problems were affecting him that day. Dellarco even felt good enough to travel to buy whiskey on that day. T1439. Dellarco was not particularly vulnerable

to what happened due to his age. A 30 year old would be just as vulnerable to a single unexpected shot.

Appellee's own argument throughout its brief belies that Dellarco was particularly vulnerable and thus targeted due to his age. Although Appellant disagrees with Appellee's claim -- Appellee apparently has posited that Appellant had "cased out" Dellarco and concluded that multiple guns and knives were needed to overcome him. Multiple weapons are not needed to overcome a person vulnerable to its disability and age. Appellee's conclusions are inconsistent with its own position. Appellant relies on his Initial Brief for further argument on this point.

POINT V

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PROSECUTOR ASKING DR. RIORDAN WHETHER HE CALLED THE JAIL AND TOLD THEM APPELLANT NEEDED PSYCHOTROPIC MEDICATIONS.

Appellee claims that psychologist Riordan's alleged failure to call the jail about dispensing medications to Appellant was permissible to show bias. However, Appellee has not disputed pages 61 -- 62 of Appellant's Initial Brief which explains Riordan was not a treating physician or psychologist -- and cannot recommend treatment and could be liable if he did. The prosecutor's misleading questioning is like the old question "Do you still beat your wife?" and should not be tolerated.

Appellee claims that the error is harmless based on speculation that the jury may have doubts about Riordan's credibility. However the harmless error test focuses on the impact of the improper evidence on the jury -- and not whether there is other evidence (whether stronger or overwhelming). As explained in Appellant's Initial Brief, the prosecutor considered it important enough to emphasize it to the jury. Appellant relies on the Initial Brief for further argument on this point.

POINT VI

THE TRIAL COURT ERRED IN FAILING TO CONSIDER AND EVALUATE STATUTORY MITIGATING CIRCUMSTANCES THAT WERE PROPOSED BY APPELLANT.

Despite the fact that the trial court did not address the statutory mitigation of age, extreme mental or emotional disturbance, and lack of significant criminal history in its sentencing order -- Appellee claims the trial court should be presumed to have considered such mitigation. Under Appellee's theory the trial court could simply write a one sentence order imposing the death sentence and it would be presumed the trial court properly considered all aggravation and mitigation. Such speculative presumptions have no place in death penalty sentencing.

Appellee does not dispute that defense counsel requested that the statutory mitigation be considered by requesting instruction on them. Appellee complains counsel did not again request this statutory mitigation in its sentencing memorandum. However, the memorandum only covered areas of mitigation that had not previously been specifically requested to be considered. Thus, it only covered the non-statutory mitigation. It did not need to reiterate the other mitigation.

Appellee then claims the error in not addressing this mitigation (which had been requested by defense counsel) was harmless based on a biased, one-sided

view of the mitigation. Appellant could do the same, but it is the trial court's responsibility (and not that of the state or defense) to specifically evaluate the proposed mitigation. Appellant relies on his Initial Brief for further argument on this point.

POINT VII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE FROM RED CAMP.

Appellee concedes that the trial court has incorrectly confused another property with Red Camp.

Appellee then claims that the trial court court's discretion as to the expectation of privacy at Red Camp must be affirmed. However, the trial court's discretion cannot be upheld if it is based on incorrect factual findings as to the area searched.

Appellee points to the testimony of Helen Brown to show a superior interest to Red Camp than belongs to Appellant. However, Brown did not even know of the existence of the structure on Red Camp in which the property was found. SRIII, T 200. This is not sufficient evidence to support denial of the motion to suppress -- especially where the trial court did not understand what property was at issue. Appellant relies on his Initial Brief for further argument on this point.

CONCLUSION

Based on the foregoing facts authorities and argument and authorities cited therein, Appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Appellant's Reply Brief has been furnished to Lisa Marie Lerner, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 North Flagler Drive, West Palm Beach, Florida 33401-3432, by U.S. Mail this _____ day of April, 2011.

_____
Jeffrey Anderson
Attorney for Appellant

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that Appellant's Reply Brief has been prepared with 14 point Times New Roman type, in compliance with a *Fla. R. App. P*. 9.210(a)(2), this _____ day of April, 2011.

_____
Counsel for Appellant