IN THE SUPREME COURT OF FLORIDA

KHADAFY KAREEM MULLENS, :

Appellant, :

vs. : Case No. SC13-1824

STATE OF FLORIDA, :

Appellee. :

:

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

CAPITAL REPLY BRIEF OF APPELLANT

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ISSUE I

THE TRIAL COURT ERRED IN ADMITTING VIDEO RECORDINGS FROM THE SURVEILLANCE CAMERAS, AND PHOTOGRAPHS TAKEN FROM THEM, BECAUSE THE STATE FAILED TO PROPERLY AUTHENTICATE THE RECORDINGS AND THE PHOTOGRAPHS.

Appellee's characterization of Appellant's argument is inaccurate. Simply put, the video evidence in this case served as the foundation for the trial judge's sentencing order with regard to the "avoid arrest" aggravator. The court also relied on the video recordings in order to weigh the prior violent felony aggravator as well as both of the statutory mitigating factors and at least one of the non-statutory mitigating factors (Sub-section D). For that reason, the lack of authentication requires reversal.

Appellee argues that the fact that Appellant pleaded guilty to these offenses excused the lack of authentication of the video recordings. However, Appellant's guilty plea did not include the facts gleaned by the judge from the video recordings as set out in the sentencing order. Appellant's plea did not take out of consideration the issue of whether or not he was under the control of Spencer Peeples, whether or not the sole motivation for the murders was to avoid arrest, whether the statutory mitigators were applicable to his case, or whether or not Appellant's mental condition and low intelligence acted as non-statutory mitigating factors. The trial judge used the video recordings to evaluate all

of these issues.

Appellant did not stipulate to the admissibility of the video recording or the photographs taken from them. Appellant's counsel made a timely objection to the lack of foundation. Without the video recordings, the factual basis of the sentencing order fails. Therefore, the evidence was crucial, and because the video was not admissible without a proper foundation, a new penalty phase is required.

Appellee argues that the testimony of the police detective who viewed the scene depicted in the video recordings (after the event in question occurred and the bodies were removed) was sufficient to authenticate the surveillance video recordings simply because the detective compared his observations of the scene with the video recordings. The detective was not at the scene when the events depicted in the video occurred and he did not access, download, or copy the recordings. The detective did not make the still photographs. In its argument, Appellee does not mention the still photographs, and Appellee makes no argument that the court was correct in allowing the State to introduce them.

Appellee also argues that the foundation was sufficient because there was no evidence of editing or tampering. However, it can be assumed that the State did not play all of the video recorded images that were stored on the system in the store. Therefore, the videos must have been excerpted; and, therefore, the videos must have been edited by someone who did not testify. Even without that assumption, Appellee's claim that there is no

evidence of tampering or editing is only true because the State did not present evidence regarding how the videos were accessed, handled, transferred, or stored.

Under Appellee's logic, any party presenting video evidence can claim that the there was no showing of editing or tampering simply because that party did not present the only witness who handled the digital or video recording. In that way, the proponent of the evidence can prevent the opposing party from cross-examining the technician or other persons who handled the images to determine whether editing or other manipulation occurred.

"It is well settled law that the party introducing a tape into evidence has the burden of going forward with sufficient evidence to show that the recording is an accurate reproduction of the conversation recorded." United States v. Sarro, 742 F.2d 1286, 1292 (11th Cir. 1984); United States v. Capers, 708 F. 3d 1286, 1305 (11th Cir. 2013) (same). Appellee's approach would shift the burden to the opponent of the evidence to determine if the evidence is what it purports to be. That is not the law. Furthermore, Appellant objected to the lack of authentication prior to the introduction of the video recordings and the still photographs taken from them. As such, Appellant was entitled to require the State to authenticate the video and photographs. See DeLong v. Williams, 232 So. 2d 246, 247-48 (Fla. 4th DCA 1970) ("Since defendant's counsel was unable to establish the alleged pre-trial stipulation that the transcript was admissible, plaintiff's counsel was entitled to require its authentication at

trial.").

The reason why courts require the proponent of the evidence to present a witness to authenticate an audio or video recording is to allow the opposing party an ample opportunity to cross-examine the person or persons who operated, installed, or loaded the cameras or recording equipment and retrieved, downloaded, and copied the audio or video recordings. In Ex Parte Fuller, 620 So. 2d 675, 679 (Ala. 1993), the Court stated that under the "silent witness" theory of authentication, the court should "listen to, or examine, in camera, the sound recording or other medium and should allow a party opposing admission to thoroughly cross-examine the predicating witness to test the accuracy and reliability of either the witness's memory or the process or mechanism to which the witness is testifying."

In Edwards v. State, 762 N.E.2d 128, 136 (Ind. Ct App. 2002), the court declared that a higher standard of authenticity and competency, including proof that the videotape has not been altered in any way, is applied in situations where the evidence is used as substantive evidence, and where there is no one who can testify as to its accuracy and authenticity, because the photograph must "speak for itself" and because a "silent witness," i.e., the videotape itself, cannot be cross examined. See id. (citing Bergner v. State, 397 N.E.2d 1012, 1015 (Ind. Ct. App. 1979)).

Appellee argues that the court did not err in admitting the video recording without proper authentication because, under

section 941.141(1),[1] the evidentiary standards for penalty phase hearings in capital cases are more relaxed. However, section 921.141(1) allows the admission of "relevant" evidence. Under section 90.901, authentication of evidence is a "condition precedent" to admissibility, and if evidence is not properly authenticated, its relevance to the case has not been established. Without proper authentication, evidence is "legally irrelevant." See State v. Hampton, 44 So. 3d 661, 664 (Fla. 2d DCA 2010) ("Authentication and identification involve laying a foundation which establishes the 'connective relevancy' of the evidence."). Also, section 921.141(1) states that "relevant" evidence may be presented regardless of "the exclusionary rules of evidence." Authentication or identification is not one of the exclusionary rules of evidence, unlike the hearsay rule.

Appellee also argues on page 30 of its brief that Appellant had a fair opportunity to rebut the authenticity of the evidence; however, Appellee does not explain what rebuttal opportunity was afforded Appellant. Appellant could not rebut the authenticity by cross-examining anyone who was in the store during the robbery and

[1]Section 921.141(1), Florida Statutes, states in pertinent part:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

depicted in the video because no such witness testified. He could not cross-examine the technician because the technician was not there. Also, Appellant chose not to testify. A defendant should not have to waive his Fifth Amendment right in order to testify regarding the authenticity of video recordings presented by the prosecution. The prosecution should have to authenticate the evidence.

Appellee argues that authentication of evidence is more important in a case where the ultimate sanctions are juvenile sanctions, see D.D.B. v. State, 109 So. 3d 1184 (Fla. 2d DCA 2013), than it is in a penalty-phase hearing where the ultimate sanction is death by execution. (See Brief of Appellee, pages 31-33). Appellee claims that the standard for admissibility is somehow less important in the penalty phase of a capital offense. However, the burden of proof is the same in the guilt phase as it is in the penalty phase. "It is axiomatic that the State is required to establish the existence of an aggravating circumstance beyond a reasonable doubt." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992) (citing State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)). Like guilt itself, aggravators must be proven beyond a reasonable doubt. Hildwin v. State, 727 So. 2d 193, 194 (Fla. 1998). Therefore, the rigorous standard of "beyond a reasonable doubt" is applicable to both types of proceedings and Appellee's distinction is without merit.

Furthermore, "death is different" and a "high degree of

certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered evenhandedly." Robertson v. State, 143 So. 3d 907, 912 (Fla. 2014) (quoting Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988) (citing Dixon, 283 So. 2d at 7)). It is also clear that the requirements of due process of law apply to the penalty phase of a capital trial. See Engle v. State, 438 So. 2d 803, 813 (Fla. 1983).

In its brief, Appellee also suggests that the State could not authenticate the video recordings because Mr. Uddin and Mr. Hayworth were dead (Brief of Appellee, pages 24-25); however, Appellee does not explain why the State could not have called the technician who accessed the video recordings, downloaded them, and made the still photographs from them. Appellee also does not explain why Mr. Barton, the victim of the attempted murder, an eyewitness who could authenticate the videos under the pictorial theory of identification, did not testify, or why the officers, who arrived on the scene and were depicted on the video and could authenticate it, did not testify.

Appellee also argues that the seven video recordings show "internal consistency." Appellee claims that "it is plain that the discs are unedited recordings of the events depicted" without mentioning that the video recordings are not consistent because the video images freeze in some of the recordings, and the timers stop progressing. There was no testimony explaining why the video from the outside of the store fails to show Mr. Barton entering

the store or why it fails to record Appellant looking out the door when Mr. Uddin picked up the telephone.

In a very recent case decided after Appellant filed his initial brief, Lerner v. Halegua, 154 So. 3d 445 (Fla. 3d DCA 2014), the Third District reiterated the requirements under the "silent witness" theory set out in Wagner v. State, 707 So. 2d 827, 830 (Fla. 1st DCA 1998), and Cirillo v. Davis, 732 So. 2d 387 (Fla. 4th DCA 1999), and concluded that the defendant failed to prove that the plaintiff engaged in litigation misconduct because there was no authentication of the video recording, which was the source of still photographs implicating the plaintiff in the delivery of threatening letters to the defendant's investigator. The court held that the photographs were not admissible because the witness presenting them had not "personally observe[d] the events depicted on the surveillance videos or the photos" and the witness had "no responsibility for the operation, placement, or maintenance of the videocamera in question, and he had no direct knowledge regarding the procedure for retrieving or copying those portions of a video record." Id. at 447-48.

In Lerner, the court wrote:

> Cirillo and a First District case upon which it relies, Wagner v. State, 707 So. 2d 827 (Fla. 1st DCA), rev. denied, 717 So. 2d 542 (Fla. 1998), establish a practical and reliable means for authenticating such "silent witness" videotapes. A witness responsible for the videotape system, able to confirm the accuracy of the time and date on which the tape was made, and able to confirm that the tape was not edited or tampered with, should be presented if there is no stipulation on

> these points, to "provide the indicia of reliability required to authenticate a videotape for purposes of the 'silent witness theory.'" Wagner, 707 So. 2d at 830.

Lerner, 154 So. 3d at 447.

Appellee also argues that the error was harmless because the confession of Spencer Peeples supports the "avoid arrest" aggravator. First, there is absolutely no reference to Peeples' confession in the sentencing order. Second, Peeples was not in the store at the time of the murders, and for that reason, his confession does not contain any information about the shooting, no less the myriad of facts about the shooting set out by the trial judge in the sentencing order – all of which came from the video recordings.

In addition, Peeples' confession contains nothing about Appellant's state of mind at the time of the shootings and it does not support a finding that Appellant's "sole or dominant motive" for the shootings was witness elimination. In fact, Peeples' only comment suggesting Appellant's state of mind is Peeples' claim that Appellant was supposed to stay in the store while he got Mr. Uddin's car and then let the men go. (13:R2126) Therefore, Peeples' statement negates the "avoid arrest" aggravator instead of supporting it.[2]

[2]It should also be noted that Peeples admitted that he was impaired during his statement to police and that he had consumed alcohol, cocaine, Ecstasy, and marijuana prior to his statement. (13:R2120)

For these reasons, and for those reasons set forth in Appellant's Initial Brief, the State failed to authenticate the video recordings and still photographs and the error is harmful and requires reversal for a new penalty phase hearing.

ISSUE II

THE CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT TO SUPPORT THE "AVOID ARREST" AGGRAVATOR BECAUSE THE EVIDENCE DOES NOT CONTRADICT THE THEORY THAT APPELLANT SHOT THE VICTIMS IMPULSIVELY IN A RAGE OR PANIC AFTER HE SAW THE STORE OWNER ON THE TELEPHONE.

Appellee argues that the evidence did not show that Appellant acted on sudden impulse, prompted by anger at the fact that Mr. Uddin was using the telephone. The fact that Appellant admitted to Dr. Machlus that he shot Mr. Uddin because he was on the phone does not exclude a theory that the shooting was impulsive. In fact, Dr. Machlus concluded from Appellant's statements that he acted impulsively without "a great deal of thought process." (10:R1465-66, 1475)

Appellee also argues that there was no reason to kill Mr. Uddin and Mr. Hayworth because the robbery was complete. However, it is certainly possible that a killing can be prompted by a perceived threat when the store clerk in a robbery makes a sudden move that jeopardizes the defendant's escape. See, e.g., Yacob v. State, 136 So. 3d 539, 550 (Fla. 2014) ("Perceiving Maida's sudden movement first to the counter and then toward the booth door as a threat to the completion of the robbery and his escape, however, Yacob immediately pulled out the gun, ran back to the booth door, and shot twice, killing Maida with the second shot.").

The evidence was also undisputed that Appellant told Dr. Machlus that he was using cocaine very heavily at the time of the offense, along with alcohol and marijuana. (9:R1348) Also, in

finding that the murders were committed while Appellant was under the influence of extreme mental or emotional disturbance, the court noted that Dr. Machlus testified that "Defendant's Bipolar I Disorder in conjunction with the Defendant's abuse of alcohol and cocaine resulted in a synergistic effect, causing the Defendant to act irrationally and impulsively." (11:R1600)

Appellee also argues that the fact that the "dummy VCR" was taken supports the aggravator. However, it should be noted that it was Spencer Peeples who took the VCR and not Appellant. (14:R2194) Peeples handed the VCR to Appellant who put it in a bag. It cannot be assumed that Appellant understood the import of Peeples' theft of the VCR.

Appellee's brief does not acknowledge that in determining whether the evidence in this case supports the "avoid arrest" aggravator the circumstantial evidence rule applies. The circumstantial evidence to prove an aggravating factor must be inconsistent with any reasonable hypothesis which negates the aggravating factor. See Eutzy v. State, 458 So. 2d 755, 757-58 (Fla. 1984). See also Calhoun v. State, 138 So. 3d 350, 363 (Fla. 2013) ("While circumstantial evidence can be used to support an aggravating factor, the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor."); Harris v. State, 843 So. 2d 856, 866 (Fla. 2003) (finding that the circumstantial evidence failed to prove that the murder was committed for pecuniary gain); Kaczmar v. State, 104 So. 3d 990, 1006-1007 (Fla. 2012) (finding that the

circumstantial evidence supporting the CCP aggravator was not inconsistent with the reasonable hypothesis that the murder was committed in a frenzied rage).

"Mere speculation on the part of the State that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." Davis v. State, 148 So. 3d 1261, 1277 (Fla. 2014). Since the death penalty may be imposed only if the State proves at least one aggravating circumstance, an aggravating circumstance is functionally an element of the crime of capital murder and, like any other element of a crime, its existence must be proven beyond a reasonable doubt. Butler v. South Carolina, 459 U.S. 932, 933-934 (1982) (Marshall, J., dissenting) (citing In re Winship, 397 U.S. 358, 364 (1970)).

The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. at 364. See also United States v. Gaudin, 515 U.S. 506 (1995) ("We have held that [the Fifth and Sixth Amendments to the United States Constitution] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt") (citing Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993)). Because the circumstantial evidence does not exclude the hypothesis that Appellant's actions were impulsive, the aggravator has not been proven beyond a reasonable doubt as guaranteed by the State and

federal constitutions.

Appellant relies on his Initial Brief in reply to the remainder of Appellee's arguments on this issue, and for these reasons, the "avoid arrest" aggravator must be struck and Appellant must be resentenced.

ISSUE III

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE COURT COMMITTED A CAMPBELL VIOLATION BY FAILING TO CONSIDER APPELLANT'S NONSTATUTORY MENTAL, BACKGROUND, AND CHARACTER MITIGATION, AND BECAUSE THE COURT MADE FACTUAL ERRORS THAT CAUSED IT TO REJECT OR IMPROPERLY WEIGH THE MITIGATION IT DID CONSIDER.

In its brief, Appellee first argues, without case law citation, that the trial court properly refused to consider the non-statutory mitigating factors in paragraphs 1 thorough 15 and 21[3] because they were considered in evaluating statutory mitigation. Appellee also argues that even though the court refused to address Appellant's mitigation in paragraphs 1 through 15, 21, 32, and 33 as non-statutory mitigation, the court nevertheless viewed the case "holistically." A case cannot be viewed holistically if many of the parts are missing.

Appellee also argues that the court did not err in failing to

[3] The nonstatutory mitigating circumstance listed by Appellant but dismissed by the court were: (1) Appellant was born with a genetic predisposition to psychological disorders; (2) Appellant is genetically predisposed to substance abuse; (3) Appellant was exposed to severe parental conflict; (4) Appellant was exposed to and victimized by child abuse and neglect; (5) Appellant had poor parental attachment; (6) Appellant was exposed to family drug and alcohol abuse; (7) Appellant was exposed to family criminal behavior; (8) Appellant suffered from violence inflicted by his older brother, Wesley Mullens; (9) Appellant suffered from residential instability; (10) Appellant was raised in poverty; (11) Appellant performed poorly in school; (12) Appellant was incarcerated in an adult penal facility as a juvenile; (13) Appellant suffers from Bipolar I Disorder; (14) Appellant suffers from the psychological disorder of Polysubstance Abuse; (15) Appellant suffers from a personality disorder; and (21) Appellant was taught by his father to commit crimes by the time he was five years old. (10:R1573-74)

address Appellant's non-statutory mitigator in paragraphs 31 and 32, that Appellant was "protective and nurturing to his younger sister" and that he "was kind and helpful to Michael Wonka" because "the trial court considered as one of the non-statutory mitigators the fact that Appellant has loving and supportive family and friends." (See Appellee's Brief at 44.)

However, the fact that Appellant's friends and family love and support him has nothing to do with whether or not Appellant was protective and nurturing to his baby sister or whether he was kind and helpful to a friend with whom he lived. One consideration has to do with whether Appellant is loved and the other consideration is whether Appellant has exhibited positive character traits that would mitigate against the death penalty. Furthermore, Appellant's sister, Kendra, passed away while Mr. Mullens was awaiting trial. Therefore, Appellant's acts of feeding and grooming his baby sister and protecting her from harm and from her father's abuse cannot be encompassed by the fact that the surviving members of Appellant's family love and support him.

The court not only erred in refusing or neglecting to address the non-statutory mitigation referenced above, the court also erred in failing to find that Appellant proved he was sexually abused by his step-father and raped in prison and erred in failing to address his Bipolar Disorder when weighing whether or not Appellant was immature, impulsive, and easily influenced. These errors are not inconsequential as Appellee suggests because the Eighth Amendment to the United States Constitution requires the

finder of fact in a capital sentencing proceeding to weigh relevant mitigating factors. See Smith v. Texas, 543 U.S. 37, 44-45 (2004) (quoting Tennard v. Dretke, 542 U.S. 274, 285 (2004)).

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). The Lockett plurality opinion notes that in Williams v. Oklahoma, 358 U.S. 576, 585 (1959), the Court wrote that "in discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." Id. at 438 U.S. 603.

In Lockett, a plurality of the Justices of the Supreme Court wrote:

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques -- probation, parole, work furloughs, to name a few -- and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id. at 605.

In Butler v. State, 100 So. 3d 638 (Fla. 2012) Justice Lararga wrote in his opinion concurring in part and dissenting in part:

> Neither the Constitution nor our Supreme Court has required that mental mitigation somehow explain or excuse the crime. It need only provide the jury with some aspect of the defendant's character or record that may serve as a basis upon which the jury might consider recommending life rather than death. This view is reinforced by the United States Supreme Court in Ayers v. Belmontes, 549 U.S. 7, 127 S.Ct. 469, 166 L.Ed.2d 334 (2006), in which the Court's discussion reconfirmed that proper mitigation is not just mitigation that explains or excuses the crime, but is any mitigating factor concerning the defendant's background and character that provides a basis for the sentencer to impose a sentence less than death. Id. at 12–13, 127 S.Ct. 469. The Supreme Court in Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009), did not in any way indicate that the mental health mitigation this Court "unreasonably discounted" was required to explain or excuse the crime. Instead, the Court reemphasized that "the Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.'" Porter, 130 S.Ct. at 454–55 (quoting Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)).

Id. at 674 n.12.

In support of its argument that the trial court correctly refused to consider the unrebutted evidence that Appellant was the victim of childhood sexual abuse and prison rape, Appellee cites Haskins v. State, 965 So. 2d 1 (Fla. 2007) and Philmore v. State, 820 So. 2d 919 (Fla. 2002), arguing that "a trial just is not required to accept expert testimony at face value." (Brief of Appellee, pages 46-47.) However, both cases involve the rejection of opinion testimony, not the rejection of facts that were

considered by the mental health experts in arriving at their conclusions.

Haskins has no applicability to this case because in Haskins the court rejected the statutory mitigator that Haskins suffered from "extreme mental or emotional disturbance at the time of the commission of the homicide," because there was conflicting psychological *opinion* testimony and other evidence showing that the defendants were not under such emotional disturbance while committing the murders. In this case, there is absolutely no evidence to rebut the evidence that Appellant was raped while incarcerated in an adult prison between the ages of 16 and 18 and by his stepfather when he was a child.

"All believable and uncontroverted mitigating evidence contained in the record must be considered and weighed in the sentencing process." Crook v. State, 813 So. 2d 68, 74 (Fla. 2002) (citing Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996)). Appellee has not pointed to any place in the record where the evidence was controverted, and Appellee does not claim the evidence is not believable. Furthermore, Appellee does not address the fact that the State did not object to this evidence.

Appellee claims that the trial court "properly discounted" the testimony of Dr. Machlus in weighing the non-statutory migrating factor in Sub-section C, that Appellant was immature, impulsive, and easily manipulated. However, it is clear that the court did not discount the testimony when considering the non-statutory mitigation in Sub-section C because the court never

even considered it one way or another. It is also clear, contrary to Appellee's claim, that the court did not reject Dr. Machlus' testimony because the court accepted the same testimony in finding that both of the mental mitigators were proven.

Finally, Appellee claims: "Appellant argues that the trial court improperly evaluated his claim that his ability to conform his behavior to the law was substantially impaired." That statement demonstrates a misunderstanding or misreading of Appellant's argument. First, Appellant's arguments regarding this issue have nothing to do with statutory mitigation and concern only non-statutory mitigation. Furthermore, contrary to Appellee's assertion, the trial court did not reject this statutory mitigator. The court determined that the statutory mental mitigator had been proven and accorded it moderate weight. (11:R1603-1604) Therefore the last two paragraphs of Appellee's argument in this issue are not relevant to Appellant's argument and should be disregarded.

Because the evidence in paragraphs 1 through 15, 21, 32, and 33 was relevant to non-statutory mitigation, and because the court failed to consider unrebutted evidence of sexual abuse and Appellant's Bipolar I Disorder as non-statutory mitigation, the sentencing order violated Appellant's Eighth and Fourteenth Amendment rights and must be vacated.

ISSUE IV

APPELLANT'S DEATH SENTENCES ARE DISPROPORTIONATE BECAUSE OF THE SUBSTANTIAL AMOUNT OF STATUTORY MENTAL MITIGATION AND OTHER NONSTATUTORY MITIGATION.

First, it should be noted that a proportionality review is still required by this Court. See Yacob, 136 So. 3d 539 ("[W]e conclude that our proportionality review flows from Florida's capital punishment statute -— section 921.141, Florida Statutes."). Proportionality review addresses the constitutional deficiencies identified in Furman v. Georgia, 408 U.S. 238 (1972), and assures that Florida's death penalty is not imposed in an arbitrary or capricious manner in violation of the Eighth Amendment to the United States Constitution. See Yacob, 136 So.3d at 548 (referring to Proffitt v. Florida, 428 U.S. 242, 251 (1976) (plurality opinion)). The Yacob Court also explained that proportionality review is required by the Due Process Clause, Art. I, § 9, of the Florida Constitution. See id. at 549. See also Robertson, 143 So. 3d 907, 909 (reemphasizing that the death penalty is reserved for only the most aggravated and least mitigated of cases).

In Yacob, this Court vacated the death sentence as disproportionate because the defendant committed the murder in response to the "perceived threat" of the store clerk's sudden movement to the counter and then toward the enclosed booth as a threat to the completion of the robbery and the escape even

though there was very little mitigation presented. See Yacob, 136 So. 3d at 550.

For the reasons stated in Appellant's Initial brief, upon which Appellant relies in reply to Appellee's Answer Brief, this case is certainly not among the "least mitigated." Furthermore, determination of proportionality is premature because the case should be sent back to the trial court for a new hearing (Issue I). Also, the trial court must re-evaluate Appellant's sentence in light of the fact that the "avoid arrest" aggravating factor was not proven (Issue II) and in light of the fact that the court did not properly evaluate Appellant's nonstatutory mitigation, as explained in Issue III above.

ISSUE V

WHETHER THE CASE HAS TO BE REMANDED TO THE TRIAL COURT FOR A WRITTEN ORDER OF COMPETENCY TO STAND TRIAL.

Appellant relies on the arguments in his Initial Brief in reply to Appellee's argument on this issue.

CERTIFICATE OF SERVICE

I certify that a copy has been served via e-mail through the Court's portal to the Attorney General's Office at capappTPA@myfloridalegal.com, on this 4th day of March, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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