IN THE SUPREME COURT OF FLORIDA

JAMES ROBERTSON, :

Appellant, :

vs. : Case No. SC13-443

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The two volume original record on appeal will be referred to by volume and page number. The transcript of the December 18, 2012 plea and sentencing hearing (contained in volume 2 of the record, but separately paginated) will be referred to as 2T, followed by a page number. The supplemental record will be referred to as SR, followed by a page number.

STATEMENT OF CASE AND FACTS

James Robertson was born in Orlando on May 26, 1963 to a nuclear and extended family of drug and alcohol abusers (PSI, 1/37, p. 8-9). After amassing an assortment of juvenile charges from age 11 to 16, and after dropping out of school in the 8th grade, he was charged as an adult (a couple of weeks before his 17th birthday) with burglary of a structure, battery on a law enforcement officer, and two counts of aggravated assault. While in jail on those charges, he and two others escaped and were recaptured. On November 12, 1980, Robertson made his entry into the Florida prison system with a total sentence of 10 years (8 on the original charges and a consecutive 2 for the escape), which -- as a consequence of crimes committed while incarcerated - - he managed to parlay into a de facto life sentence (PSI 1/37, p. 5-11; see 1/104,106,160; 2T/37-39). In 1998 he made a nearly successful suicide attempt by hanging himself with a bedsheet, resulting in hospitalization and drug treatment (1/22, p.3; 1/23, p.5).

In July 2008 when Robertson - - now 45 years old and having

spent all of his adult life in prison (with a prospective release date of 2038) - - was housed in close confinement in the Charlotte Correctional Institution he began formulating an escape plan of a different kind. Robertson believed that, in light of his track record, he was never getting out of close confinement; he was aging fast and his health was inevitably going to decline. Suicide was not an option; for reasons of "dignity" and because it was the state that took away his freedom, he was going to make the state kill him. In order to achieve that goal, he needed to kill someone else, and do it in such a way as would ensure that he would receive a death sentence. Over the next five months he gave the matter considerable thought (1/104-09,160-62,175; 2/222; 2T/ 33-34; psychiatric and psychological evaluations, 1/32, p.1,3,5 (Dr. Silver), 1/37, p. 4-5 (Dr. Schaerf)).

In December 2008, Robertson's cellmate was a 52 year old man named Frank Hart. Because Hart was small (5'6", 133 pounds), Robertson thought he could easily overpower him. In addition, Robertson believed (based, he later claimed, on what he'd been told by prison guards) that Hart was a child molester, plus his hygiene was bad and his behavior was odd. Because Robertson thought that Hart was about to be moved out of the cell and transferred to general population, he decided to take action, and on the night of December 9 he strangled Hart to death with a ligature made of socks (1/105,108,111-16,128-29,163; 2/200,207,214, 221-22; 2T/32-35; PSI 1/37,p. 2-3,12).

Robertson knew that he would be the only suspect since nobody else was in the cell, but it was his belief that the state would

only give you the death penalty if they thought you wanted to live; if they thought you wanted a death sentence, they wouldn't give it to you. Based on that reasoning, when questioned by DOC investigators, he denied killing Hart (1/117-18,131-33,135,2/200-01).

In so doing, he outsmarted himself. To his anger and dismay, Robertson was charged on May 27, 2009 with second-degree murder, for which death is not a possible punishment. At that point he changed tactics; at his June 11, 2009 first appearance hearing he insisted that it was first-degree murder and it was premeditated (1/1-2,176-77; see 1/158-159; 2/241; SR 39-42). He began a letter writing campaign to the State Attorney's office in which he insisted that the charge was wrong, the killing of Hart was premeditated, and if he didn't get what he wanted he would just have to kill someone else (1/122-28,135-37; see 1/158-59,176-77; 2/241; SR 39-42). "My secondary motive was I wanted to get some guards in trouble but . . . I don't even care about that anymore. I just want my death penalty" (1/128).

Meanwhile, the state had announced at Robertson's August 10, 2009 arraignment that it was willing to offer a plea to life imprisonment on the second-degree murder charge; and only if he refused that offer would the state "take the case before the grand jury and seek indictment for capital murder" (2/241-42). Since an indictment for capital murder was precisely what Robertson wanted, he promptly refused the plea offer (2/262-63; see SR 50,176).

Nevertheless, the second-degree murder charge remained pending throughout the rest of 2009, as well as 2010 and 2011.

Robertson was represented by a succession of lawyers[1], and for a period of time - - after a combined Nelson/Faretta hearing[2] (2/241-262) - - he represented himself. [Part of Robertson's conflict with his attorneys - - according to several of the latter - - was that he wanted to run the defense that the homicide was the DOC's fault because they knowingly put Robertson and Hart in a cell together although both wanted to be moved. Robertson believed that correctional officers wanted him to harm Hart. (See 2/200; SR 27,42,70-77,80-82,86-87,90-95,112-16,118-20; PSI 1/37, p. 12; Dr. Silver's sanity evaluation 1/22, p. 3).

In 2011, while Robertson was represented by attorney Jay Brizel, a notice of intent to rely on an insanity defense was filed (SR 132,138-45,152,158-60). Examinations were conducted by Dr. Silver in August of that year and by Dr. Schaerf in October; both concluded that Robertson did not meet the standard for insanity (1/22, p. 1-6, 1/23, p. 2-8).

In December 2011, Robertson - - in order to prove he was serious in his ongoing demand for the death penalty - - decided to attack a correctional officer in the Charlotte County Jail, where he was still awaiting trial on the second-degree murder charge. His goal, he later explained, was not to kill the officer but rather to get his keys so he could unlock a cell and kill an

[1] These include assistant public defenders McCormick and Cooper (1/3-6;2/239-261; SR 8-12,15-21); regional counsel (1/7-8; SR 23-24); and private attorneys Cerino (1/9-17; SR 26-123); Brizel (1/18-26; SR 121-162); Bass (SR 165); and finally DeSisto (with Lombardo)(1/27-31,91-169; 2T/2-88; SR 168-198).

[2] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973); Faretta v. California, 422 U.S. 806 (1975).

inmate. Because he did not have access to a good weapon, he took a wire off a cleaning cart (although it was not firm enough and could not be sufficiently sharpened). He struck the guard twice in the rib cage, and the wire bent in half; he did not succeed in getting the keys (1/137-143). This incident resulted in charges of attempted murder and attempted robbery (PSI, 1/37, p. 10).

Robertson's final attorney was Mark DeSisto, who was appointed on February 20, 2012 (SR 169). [Mr. DeSisto was not death qualified (see 2T/16-18), but at the time of his appointment Robertson still was not charged with a capital offense]. Robertson asked DeSisto to get him a death sentence at all costs (1/146), and DeSisto engaged in talks with the state to bring about that result (1/147). At a hearing on June 20, 2012, in which Robertson's presence had been waived (SR 175,177), DeSisto told Judge Greider:

> My client does want a plea, but he wants to plea to a death penalty case. That wasn't offered initially, but I talked to Mr. Mason, and doing the research, and if I can put it together, he might go ahead and do a –- do a death penalty case and then we'll just enter a plea to it, but, again, I don't know if it's going to go that route or not.

(SR 176)

On October 19, 2012 - - still charged with second-degree murder - - Robertson executed a sworn affidavit (before DeSisto as notary public), in which he stated that he had instructed his attorney to seek an indictment for first-degree murder and "further to seek the penalty of death." "I specifically instructed my attorney [to] ensure a 'rock solid' plea and sentencing be conducted that could stave off reversal under the automatic appellate

review." Mr. DeSisto "has been my 7th appointed attorney and has been the one attorney to listen to my requests and accomplish what I requested of him." Robertson stated that he had "premeditated every step of the murder I accomplished on my cell mate", and his actions in regard to the attempted murder of the jail guard were also "thought out and planned for a protracted period of time." He was still "planning my next kill if needed to achieve my personal desire to be put to death." It was his voluntary decision to enter a plea "with the intention of receiving the death penalty at the conclusion of this matter", and he waived his right to a penalty phase jury. Robertson instructed his attorney not to present any mitigating evidence, and "further instructed him not to retain a mitigation expert to do any type of investigation to avoid finding facts that could be used to outweigh the aggravating factors that the Court must find to sentence me to death. To the contrary, I have instructed my attorney, Mr. DeSisto, to work in concert with the State of Florida in ensuring all aggravating factors are well prepared in advance and presented for the Court's consideration." (1/167-169).

While Mr. DeSisto had informed Robertson that the trial court "has a duty to review the entire record and any source for mitigation evidence despite my request to have none presented", nevertheless "unless under Order of the Court, I have instructed him not to present anything that could possibly preclude me from being sentenced to death" (1/168).

In the affidavit, Robertson agreed to be evaluated by two mental health professionals, in order to make appropriate findings

as to his competency to make knowing, intelligent, and voluntary decisions in this matter. He also agreed to a recorded interview by a State Attorney's Office investigator, in the presence of his attorney, Mr. DeSisto (1/168).

At the beginning of the recorded interview on the same day (October 19, 2012), Mr. DeSisto introduced State Attorney's investigators Jennifer Ladelfa (from Charlotte County) and Barry Lewis (Lee County)(1/93). DeSisto read the affidavit aloud, after which Robertson signed it (1/93-100). DeSisto could not bring his notary stamp inside the jail, "[b]ut as soon as I return to my office, I will notarize it and this will become a part of the official record in the court file" (1/100).

After his Miranda rights were read and waived, Robertson described the events of the murder of Frank Hart (1/105-21) and the attack on the jail guard three years later (1/137-143) to the investigators. Now that the murder charge was about to be upgraded to first-degree and the state would be seeking the death penalty, Robertson assured the investigators that he was "no threat to anybody now, because, you know, they're going to give me what I want . . ." "I'm not looking for no attention or anything like that. I don't want nobody to feel sorry for me. I just . . . want to get, you know, get my death sentence and go on down the road, get out of you all's hair" (1/145). Investigator Ladelfa asked whether, if for some reason he didn't get that, would he continue to kill people, and Robertson answered that he would (1/146).

> INVESTIGATOR LADELFA: Would you - - would it be anybody?

> MR. ROBERTSON: Anybody.
>
> INVESTIGATOR LADELFA: Would it be any opportunity?
>
> MR. ROBERTSON: Any opportunity that presents itself. You know - - you know, usually, there's so many people in the prison that I hate, inmates and guards . . . [that] . . . I don't really have a problem finding anybody that I dislike to get . . .

(1/146).

However, even if it was somebody he liked it wouldn't matter (1/146).

At that point, Robertson's lawyer, Mr. DeSisto, stated, "James, even though you really want the death sentence, and you asked me, at all costs, to get you the death sentence, you do understand that, under the criteria of what you did, that that's just one factor the State took into consideration when I talked to them about giving you the death penalty. I mean, obviously, we don't give people the death penalty because they ask for it" (1/147). The state attorney's office had looked at the murder and the attempted murder:

> MR. ROBERTSON: And look at my past, record and everything.
>
> MR. DESISTO: Your record and the possibility of what you'll do in the future.
>
> MR. ROBERTSON: Yeah.
>
> MR. DESISTO: They looked at all that, and that's why I was able to get what you wanted after so long, okay.

(1/147)

On October 26, 2012, the grand jury indicted Robertson for first degree murder (1/33-34; see SR 195-198). On that same date, attorney Joseph Lombardo (who was death qualified) filed a notice

of appearance; his role was to assist Mr. DeSisto (who was not death qualified)(2T/16-18).

Prior to the plea and sentencing hearing, Robertson was re-examined by Drs. Silver and Schaerf, both of whom concluded that he was competent to knowingly and voluntarily enter a guilty plea and to waive his legal rights and remedies regarding the death penalty proceedings (1/32; 1/37). A pre-sentence investigation report (PSI) was prepared by correctional probation senior officer Michael Gottfried (1/37), in which the Department of Corrections recommended that Robertson receive the death penalty (PSI, p.12).

The plea and sentencing hearing took place on December 18, 2012 before Circuit Judge Christine Greider. At the outset, several items were made part of the record, including (1) Robertson's October 19, 2012 affidavit waiving an assortment of rights (including his right to a jury) pertaining to the penalty proceeding (1/166-69; 2T/41-42); (2) Robertson's videotaped interview (and a transcript thereof) with Mr. DeSisto and investigators Ladelfa and Lewis on October 19, 2012 (1/91-165; 2T/12,40-41); (3) a stipulation regarding the facts of the murder of Frank Hart (2T/10, 32-36); (4) the report of the autopsy examination performed by associate medical examiner Dr. Daniel Schultz (2/201-14; 2T/10-11, 43); (5) the report of the Department of Corrections' investigation, conducted by Inspector James Mitchell, into the homicide of Frank Hart (2/179-203; 2T/11,43); (6) an audio recording and transcript of Robertson's June 11, 2009 first appearance hearing (on the original charge of second-degree murder)(1/170-177; 2T/11-12,42,54-55); (7) judgments and sentences from prior

convictions (1/39-75; 2T/36-40); and (8) the competency evaluation reports of Drs. Silver and Schaerf (1/32; 2T/7-8,55-56). With the exception of a scrivener's error on a date in the PSI (2T/7-8, 56), the admissibility and accuracy of each of these items was agreed to, or not objected to, by the defense (see 2T/8-13,31-43,55-56). While cataloging the exhibits and reports, Judge Greider "point[ed] out for the record that my entirety of review occurred well before today" (2T/12).

During the plea colloquy conducted by the prosecutor (2T/22-31), Robertson stated that he was "very" satisfied with the legal work which Mr. DeSisto and Mr. Lombardo had done for him (2T/24). He understands the English language and has a GED (2T/23). He was not currently under the influence of any drugs, alcohol, or prescription medications (2T/23). Asked whether he currently suffered from any mental illness, or whether he had ever suffered from any mental illness, Robertson answered, "No, sir" (2T/23-24). He indicated that he understood the plea agreement and the rights he was waiving (2T/24-31). The trial judge read into the record the stipulated factual basis, accepted Robertson's guilty plea, and adjudicated him guilty as charged in the indictment (2T/31-36).

Transitioning immediately into the penalty proceeding, the state introduced the aforementioned documents, reports, tapes, and transcripts into evidence, and then called correctional probation officer Gottfried (who prepared the PSI) as its sole witness (2T/36-44,50,55). Gottfried reviewed DOC records (which were introduced into evidence) and determined that Robertson was

serving a prison sentence at the time of the homicide in December 2008 (2T/45-50; 1/79-90).

On cross-examination, Mr. DeSisto asked Gottfried to describe Robertson's actions, characteristics, or statements while he was being interviewed for the PSI (2T/50-51). Gottfried replied that he spoke with Robertson for over an hour and found him lucid and cooperative (2T/51). "I did ask him about the offense. I did ask him whether or not he had any remorse, to which he answered none whatsoever" (2T/51). Gottfried talked to Robertson about why he committed the offense, and "he was very honest in stating that he no longer wanted to live in close management" (2T/51,see 53). According to Gottfried, close management is made for people, like Robertson, who are dangerous to other inmates and to correctional officers (2T/52). In his experience, Gottfried thought Robertson was correct in his belief that there would be no other way out of close management for him (2T/53). DeSisto asked Gottfried whether (notwithstanding Robertson's wishes) he felt - - based on his professional opinion and background - - that this is a case which warrants to death penalty, and Gottfried answered "yes" (2T/53).

The state rested. Judge Greider asked Mr. DeSisto if the defense wished to present any evidence or testimony, and he replied that he'd like to ask Robertson some questions (2T/54-56). Robertson (still under oath) acknowledged that he committed the homicide to which he had just pled guilty, as well as the various prior violent felonies and the attempted murder of the jail guard (2T/57-58).

> MR. DESISTO: You don't have any remorse for anything you have done, do you?

MR. ROBERTSON: No.

MR. DESISTO: And you're going to continue to kill or try to kill anybody and everybody you can till you get your point across; correct.

MR. ROBERTSON: Yes.

(2T/58)

In response to DeSisto's questioning, Robertson said he didn't know whether - - after spending the last 32 of his 49 years incarcerated - - he had the coping ability to function in normal society; the skills needed in prison are different (2T/58-59).

MR. DESISTO: Okay. In other words, if you want something and you don't get it, you shiv someone and you do whatever you have to do; correct?

MR. ROBERTSON: Right.

(2T/59)

Then, returning to his earlier subject matter, Mr. DeSisto asked:

I think - - I believe I've already asked you if you had - - you have no remorse for what you've done; correct?

MR. ROBERTSON: None.

MR. DESISTO: In fact, if you don't receive the death penalty, more than likely there will be another innocent person that will be killed; correct?

MR. ROBERTSON: Yes.

(2T/60)

Finally, DeSisto asked Robertson whether he understood that if he did receive a death sentence it would not be because of his request for it, but rather because of the statutory aggravators which would support the findings that the case warranted death. Robertson replied that he understood (2T/60-61).

Before assistant state attorney Patterson gave his argument regarding the aggravators, assistant state attorney Feinberg sought to forestall a potential error arising from Mr. DeSisto's examination of his client:

> . . . [F]rom the legal perspective, the State is not asking the Court to consider his lack of remorse, or his statements of intent to commit further crimes in the future as a legal aggravator, as the aggravators are laid out by the Statute. And those should not be things that the Court considers an aggravator or in support of his death penalty.
>
> I understand he's chosen to put that information on the record, but we would not want the Court to reflect those matters in the Order, which you would issue should you determine the death penalty.
>
> THE COURT: Thank you, Mr. Feinberg. I do not find that the stated answers by Mr. Robertson are statutory aggravators.

(2T/61-62)

The state argued that the following aggravators were established: (1) homicide committed by a person under sentence of imprisonment; (2) prior convictions of violent felonies; (3) HAC; and (4) CCP (2T/62-67).

Asked whether the defense wished to be heard as to the state's argument with regard to aggravating factors, Mr. DeSisto said, "Your Honor, we're going to adopt and concur on all the State's aggravators" (2T/68). Mr. DeSisto explained:

> I understand, obviously, I'm making a record more like my brother's on the Bar, like I'm the prosecutor. Nonetheless, at the request of the defendant, which I'm sure he - - make sure is clear on the record, but we do adopt their aggravators. We have no objection to them.

(2T/68)

The state then reiterated that its "request for the death penalty is based on the four aggravators that we feel have been

proven, and not on the desires of the defendant" (2T/68).

The trial judge asked counsel for both parties if there was anything further before she pronounced sentence. The prosecutor had nothing further. Mr. DeSisto, for the defense, said:

> The only thing I'd bring to the Court's attention, which I'm sure the Court is aware, but just to make the record again, the - - under [K]oon versus D[ug]ger, 619 So.2nd, 246 Florida 1993, which I previously provided to counsel and the Court.
>
> The Court must discuss the waiver of mitigation by defense counsel that was the defendant's wish. That no mitigation would be done on his behalf. And the Court further has the obligation under M[u]hamm[a]d versus State, 782 So. 2nd, 343, Florida 2001, emphasizing that the duty of the Court is to consider all mitigating evidence anywhere in the record.
>
> THE COURT: I have, and I will.
>
> MR. DESISTO: I know you will, Your Honor.

(2T/69)

Mr. DeSisto then stated for the record that Mr. Robertson does not meet any of the statutory mitigating circumstances set forth in §921.141, paragraphs (a) through (h)(2T/69).

Judge Greider thanked counsel and said, "We've been working for about an hour and 20 minutes. This appears to be a good time for us to take our mid afternoon break. It will be ten minutes in duration. I'll ask that we reconvene at 2:30, at which time this Court will announce its sentence" (2T/69-70).

According to the clerk's Minutes, the break actually lasted eleven minutes, and court was back in session at 2:31 p.m. (2/217). The judge (apparently reading from her written sentencing order which contains virtually identical language, including the phrase "stated intention to enter a plea of guilty") announced

that in the case of State of Florida versus James Robertson "this cause comes before the Court on the Defendant's stated intention to enter a plea of guilty to first degree premeditated murder, so that he can receive the death penalty. Pursuant to his sworn Affidavit, the defendant has waived his right to a trial, a penalty phase, presentation of mitigation evidence and a sentencing hearing (2T/71-72; see 2/219).

Briefly pausing in her pronouncement of sentence, the judge asked Robertson whether he reaffirmed under oath his waiver of his right to present mitigation evidence, and Robertson replied, "Yes, Your Honor" (2T/72). The judge then returned to her sentencing findings (once again, in language virtually identical to that in the written order): "Having reviewed the case file, and the parties having stipulated to the Court's in camera review, I hereby find as follows:" (2T/72; 2/219).

Judge Greider's oral and written findings were subdivided into four headings: (A) Defendant's Wishes and Intent; (B) Aggravating Factors; (C) Mitigating Factors; and (D) Sentencing Circumstances and Proportionality (2T/72,74,80,84; 2/219,220, 223,225). As to the first of these, the judge announced:

> A, Defendant[']s] Wishes and Intent. The defendant in this case has repeatedly expressed his wish to enter a plea of guilty to first-degree murder, with the intention of receiving a sentence of death.
>
> At first appearance on June 11th of 2009, the defendant stated that the charge should be first-degree murder, rather than second-degree murder. Because it was premeditated. The defendant stated in his October 19th 2012 Affidavit that he wanted to plead guilty to first-degree murder, and receive a death sentence.
>
> The defendant reiterated these statements to Dr. Silver. According to Dr. Silver's October 19th, 2012

> report, and to Dr. Schaerf, in Dr. Schaerf's report following his evaluation of the defendant on November 2nd, 2012.
>
> The Presentence Investigation Report references a Forensic Psychiatric Evaluation of defendant on October 19th of 2011, where the defendant indicated he had been, quote, "thinking about how to get to death row," end quote, since 2008.
>
> In the defendant's recorded statement taken on October 19th of 2012, the defendant indicated he had been thinking about how to get the death penalty since July 2008. And after murdering his cellmate, when he realized he was being charged with second-degree murder, he wrote to five individuals in the State Attorney's Office in 2009, indicating that the murder was premeditated, and requesting the death penalty.
>
> In the recorded statement, the defendant told the investigators that if he did not receive the death penalty, he would continue to kill until he received it. Accordingly, the Court assigns great weight to the defendant's wishes and intent.

(2T/72-74)(emphasis supplied)

[Again, the language of the oral pronouncement is virtually identical to that of the written sentencing order (see 2/219-20). A further indication that Judge Greider was reading her previously prepared written order (as opposed to extemporaneously making oral statements which were later transcribed) is her use of the terms "quote" and "end quote", where the written sentencing order contains quotations marks around the phrase "thinking about how to go to death row" (compare 2T/73 with 2/219)].

In part B of her oral and written findings, the trial judge found the four aggravating factors presented by the state (and adopted by the defense): (1) prior violent felony convictions (moderate weight); (2) under sentence of imprisonment (moderate weight); (3) HAC (great weight); and (4) CCP

(great weight) (2T/74-80; 2/220-22). Again, the language of the oral pronouncement and the written order are virtually identical, with a single exception.[3]

In Part C of her oral and written findings (which, again, are virtually identical), the trial court said she considered the information in Robertson's recorded statement, the PSI, and the evaluations of Drs. Silver and Schaerf (2T/80; 2/223). She found that "Defendant has a significant criminal history, was not an accomplice, was not under the domination of another person, was a mature 45 year old adult, and that there is no evidence that his capacity to appreciate the criminality of his conduct or to conform his conduct [or, as inaccurately transcribed at 2T/80, "confirm misconduct"] to the requirements of law was impaired in any way" (2/223; see 2T/80-81). Based on Robertson's comments in his recorded statement that he was tired of being in prison (and in close management) after 32 years, and was depressed, miserable, and had nothing to look forward to, the trial judge found the statutory mitigator of extreme mental or emotional disturbance, but gave it little weight (2T/81-82; 2/223). Regarding the "catchall" statutory mitigator of the defendant's charac-

[3] The only significant discrepancy between the written order and the oral pronouncement is that the order contains the following sentence regarding the HAC finding - - "Defendant's recorded statement shows that the victim was in fear and fighting for his life prior to Defendant overpowering him and strangling him" (2/221) - - while the oral pronouncement instead contains the comment - - "I would point out that as it relates to the rope made of socks to ensure that they were sufficiently taut, the defendant took an additional step of inserting a rolled-up magazine within the socks or used that to ensure adequate tautness" (2T/77).

ter, record, or background, the judge considered five possible areas[4] and concluded:

> This Court has thoroughly analyzed the possibility that some mitigation may exist in these areas. The presentence investigation indicates that there is a family history of substance abuse and alcoholism.
>
> In the presentence investigation, the defendant informed the interviewer that he and his mother had been beaten by his father. The defendant admitted that his family was poor. The defendant admitted to using alcohol, smoking cigarettes, and using marijuana since age 12. And stated that he had sniffed gasoline and toluene, and had used LSD – and madam court reporter, toluene is T-O-L-U-E-N-E. And that he had used LSD, Quaaludes, morphine, Valium, PCP, amphetamines and nasal inhalers. The defendant stated he had been very hyper as a child. This hyperactivity could be a sign of an underlying disorder. While the defendant had dropped out of school after the eighth grade, the presentence investigation does indicate that he completed GED in prison in 1982. Defendant's criminal history showed he has convictions from the age of 13, and has been continuously incarcerated since 1980 when he was 17. As a result of defendant's background and continuous incarceration, it cannot be said that the defendant ever had a chance to have a normal life.
>
> The Court finds that competent, uncontroverted evidence of mitigation exists. Accordingly, the Court assigns these mitigating factors little weight.

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[4] (a) From a genetic perspective, Defendant's father, mother, maternal aunt, paternal uncle, grandmother and grandfather were alcoholics or substance abusers.

(b) In early childhood, Defendant was very hyper.

(c) Defendant's poor family background of poverty, substance abuse and violence.

(d) Defendant has a background of substance abuse and criminal history, has been in custody continuously since 1980. Defendant has never had a job, a meaningful relationship, or a normal life.

(e) Defendant obtained his GED in 1982 while in prison.

2/224; see 2T/82-83)

In Part D of her oral and written findings (again virtually identical), Judge Greider reiterated that, in addition to the four statutory aggravators she found, "The Court also gave great weight to defendant's wish and intent to be put to death" (2T/85; 2/225). Concluding that the aggravating circumstances outweighed the mitigating factors, she imposed the death penalty (2T/86-87; 2/225-26). This appeal follows.

On January 31, 2014, undersigned appellate counsel moved to withdraw from representing Mr. Robertson, or, in the alternative, for clarification as to whether to brief the case for the death penalty (the objective sought by Mr. Robertson) or against the death penalty (contrary to Mr. Robertson's wishes). On July 10, 2014, by a 4-3 vote, this Court denied the motion to withdraw and directed the undersigned to brief the case against the death penalty; "[W]e discern no ethical violation in requiring current counsel to continue to prosecute this appeal fully for the benefit of the Court in meeting its statutory and constitutional duties." Robertson v. State, 2014 WL 3360330 (Fla. 2014), p.3 (emphasis supplied). The Court's decision allowed Robertson to submit a pro se supplemental brief setting forth his personal position on the matter, which he filed on July 14, 2014.

Justice Canady, joined by Justice Polston, dissented with an opinion stating that appellate counsel "has been placed in an untenable ethical position because Mr. Robertson has not been allowed to waive his right of appeal." Id., p.8. Justice Quince dissented without an opinion.

SUMMARY OF ARGUMENT

"Even though [a] defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature, and the courts." Goode v. State, 365 So.2d 381,384(Fla.1978). While a competent capital defendant can waive the presentation of mitigating evidence, this Court has made it clear that "[t]his does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence." Hamblen v. State, 527 So.2d 800,804(Fla.1988).

James Robertson's case is riddled with procedural and substantive errors which occurred largely as a result of "death by default" shortcuts, and his sentence - - regardless of his own death wish - - cannot be upheld. These serious errors include (1) defense counsel's latching onto Robertson's instructions to actively seek the death penalty and to avoid finding mitigating evidence; (2) the trial court's and defense counsel's failure to comply with the requirements of Koon v. Dugger, 619 So.2d 246,250(Fla.1993); (3) the lack of a comprehensive PSI as required by Muhammad v. State, 782 So.2d 343,363(Fla.2001) and Florida Rule of Criminal Procedure 3.710(b), coupled with the PSI's improper (and zealously adversarial) recommendation of a death sentence;

(4) the trial court’s precommitment to impose the death penalty, as evidenced by her preparation of the written sentencing order before the plea and sentencing hearing was held; (5) the great weight accorded by the trial court to the nonstatutory aggravator (or non-aggravator) of the “defendant’s wishes and intent”; and (6) under the extreme circumstances of this case, the trial court’s abuse of her discretion by failing to appoint special mitigation counsel.

ARGUMENT

ISSUE

THE SEQUENCE OF EVENTS RESULTING IN JAMES ROBERTSON'S DEATH SENTENCE DOES NOT COMPLY WITH THE PROCEDURAL AND SUBSTANTIVE STANDARDS SET BY THE UNITED STATES AND FLORIDA CONSTITUTIONS, THE LEGISLATURE, THE U.S. SUPREME COURT, AND THIS COURT, AND - - IF THE SENTENCE IS CARRIED OUT - - WOULD RESULT IN STATE ASSISTED SUICIDE.

A. Death by Default

This is a "troubling area of the law" [Farr v. State, 656 So.2d 448,450(Fla.1995)] which has been vexing this Court, not to mention trial and appellate defense attorneys and prosecutors, for over 25 years. See, e.g. Hamblen v. State, 527 So.2d 800 (Fla. 1988); Koon v. Dugger, 619 So.2d 246, 249-50 (Fla.1993); Farr v. State, supra, 656 So.2d at 449-50 (opinion of the Court) and 451-53 (Kogan, J., joined by Anstead, J., concurring in part and dissenting in part); Muhammad v. State, 782 So.2d 343, 361-65 (Fla.2001)(opinion of the Court) and 368-372 (Pariente, J., joined by Shaw and Anstead, JJ., specially concurring).

"Even though [a] defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature, and the courts." Goode v. State, 365 So.2d 381,384 (Fla. 1978). In the lead case - - Hamblen - - which, by a 5-2 vote, allows competent capital defendants to waive the presentation of mitigating evidence, the majority made it clear that "[t]his does not mean that courts of this state can administer the death penalty by default. The rights, responsibil-

ities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence." 527 So.2d at 804.

This Court has recognized that, on a case-by-case basis [Farr, 656 So.2d at 450], it has "continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation . . ." Muhammad, 782 So.2d at 363 (opinion of the Court). [Justice Pariente's specially concurring opinion in Muhammad, 782 So.2d at 371, also characterizes such cases as "relatively rare"]. But in fact, from Goode and Hamblen to the pending case of David Kelsey Sparre v. State, SC12-891 (orally argued on December 3, 2013) and the instant case, full or partial waivers of mitigation are not all that rare[5]. The cases run the

[5] See, e.g., Hamblen v. State, 527 So.2d 800(Fla.1988); Klokoc v. State, 589 So.2d 219(Fla.1991); Pettit v. State, 591 So.2d 618(Fla.1992); Durocher v. State, 604 So.2d 810(Fla.1992); Clark v. State, 613 So.2d 412(Fla.1992); Koon v. Dugger, 619 So.2d 246(Fla.1993); Robinson v. State, 684 So.2d 175(Fla.1996); Hauser v. State, 701 So.2d 329 (Fla.1997); Chandler v. State, 702 So.2d 186,199-200(Fla.1997); Muhammad v. State, 782 So.2d 343,361-65(Fla.2001); LaMarca v. State, 785 So.2d 1209,1212(Fla.2001); Waterhouse v. State, 792 So.2d 1176,1183-84(Fla.2001); Mora v. State, 814 So.2d 322,331-33(Fla.2002); Ocha v. State, 826 So.2d 956(Fla.2002); State v. Lewis, 838 So.2d 1102,1106-14(Fla.2002); Grim v. State, 841 So.2d 455,459-62)(Fla.2003); Power v. State, 886 So.2d 952,962(Fla.2004); Fitzpatrick v. State, 900 So.2d 495,523-24(Fla.2005); Boyd v. State, 910 So.2d 167,188-90(Fla. 2005); State v. Larzelere, 979 So.2d 195,202-06(Fla.2008); Derrick v. State, 983 So.2d 443,460(Fla.2008); State v. Pearce, 994 So.2d 1094,1102-03(Fla.2008); Ferrell v. State, 29 So.3d 959,980-85(Fla.2010); Barnes v. State, 29 So.3d 1010(Fla.2010); Twilegar v. State, 42 So.3d 177,201-04(Fla.2010); Dessaure v. State, 55 So.3d 478,484-85(Fla.2011); Wyatt v. State, 71 So.3d 86,107-09(Fla.2011); Russ v. State, 73 So.3d 178,188-91(Fla. 2011); Krawczuk v. State, 92 So.3d 195,203-05 (Fla.2012); Reynolds v. State, 99 So.3d 459,493-97(Fla.2012); Sparre v. State, SC12-891(orally argued on December 3, 2013).

gamut from those where the defendant is simply choosing not to present certain witnesses in mitigation or a specific category of mitigating evidence [see, e.g., Mora v. State, 814 So.2d 322,331-33(Fla.2002); Power v. State, 886 So.2d 952,959-62(Fla.2004); Boyd v. State, 910 So.2d 167,189(Fla.2005); Eaglin v. State, 19 So.3d 935,945-46(Fla.2009); McCray v. State, 71 So.3d 848,879-80(Fla. 2011)] to those like Hamblen and Farr where the defendant is adamantly seeking to be put to death and is waiving everything he can waive. The instant case is at extreme end of that continuum. Robertson decided he preferred to die than remain in prison in close confinement. For reasons of "dignity" and because it was the state that took away his freedom, he was going to make the state kill him. He strangled his cellmate to achieve that end, and when - - to his chagrin - - he was charged with second-degree murder, he embarked on a campaign to have the charge upgraded to first-degree murder so he could be sentenced to death. After going through a series of lawyers with whom he was dissatisfied, finally one was appointed who agreed to work toward Robertson's goal. Robertson asked Mr. DeSisto to get him a death sentence at all costs (1/146), and DeSisto engaged in talks with the state to bring about that result (1/147)(" . . . and that's why I was able to get what you wanted after so long . . ."). As stated in Robertson's October 19, 2012 affidavit, "Mr. DeSisto has been my 7th appointed attorney and has been the one attorney to listen to my requests and accomplish what I requested of him" (1/167). Specifically, "I have instructed and continue to instruct my attorney . . . to seek the charge to be amended to First Degree

Murder by indictment and further to seek the penalty of death" (1/167). Robertson further requested Mr. DeSisto to ensure that a "rock solid" plea and sentencing be conducted in order to stave off the possibility of reversal on appeal (1/167). In addition to waiving a penalty jury and a Spencer hearing, Robertson not only waived the presentation of any mitigating evidence, he also instructed Mr. DeSisto not to do any investigation "to avoid finding facts that could be used to outweigh the aggravating factors that the Court must find to sentence me to death" (1/168). Instead, Robertson directed Mr. DeSisto to work in concert with the State in ensuring that all aggravating factors be well prepared and presented (1/168). In the penalty hearing itself, Mr. DeSisto acknowledged that he was behaving more like a prosecutor, but he was doing so at Robertson's request (2T/68). [In fact, Mr. DeSisto was behaving like an overzealous prosecutor, eliciting and emphasizing improper factors like lack of remorse[6] and future dangerousness[7], while the actual prosecutor was cautioning the trial judge not to rely on such factors (2T/58-62)]. See Clark v. State, 690 So.2d 1280,1283(Fla.1997).

Despite all that, undersigned appellate counsel is not comfortable with coming down too hard on Mr. DeSisto, because he may well have believed he was ethically required to pursue his client's objectives. See Rules Regulating the Florida Bar, Rule

[6] See, e.g., McCampbell v. State, 421 So.2d 1072,1075(Fla.1982); Hill v. State, 549 So.2d 179,184(Fla.1989); Tanzi v. State, 964 So.2d 106,114-15(Fla.2007).

[7] See, e.g., Teffeteller v. State, 439 So.2d 840,844-45(Fla. 1983); Walker v. State, 707 So.2d 300,313-14(Fla.1997); Delhall v. State, 95 So.3d 134,168-70(Fla.2012).

of Professional Conduct 4-1.2(a); Florida Bar v. Glant, 645 So.2d 962(Fla.1994); Florida Bar v. Vining, 721 So.2d 1164,1168 (Fla. 1998); Edwards v. State, 88 So.3d 368,374(Fla.5th DCA 2012). Mr. DeSisto was on the opposite horn of the dilemma from the one which was impaling appellate counsel when he moved to withdraw from Robertson's appeal. The anomaly is that, under current Florida law, an adversarial appeal (in which the arguments for and against the death sentence are presented by counsel) is required [Klokoc v. State, 589 So.2d 219(Fla.1991), holding reaffirmed in Robertson v. State, 2014 WL 3360330(Fla. July 10, 2014)], while - - in contrast - - an adversarial penalty proceeding at the trial level, in which the evidence and arguments for and against the death penalty are presented by counsel, is not necessarily required. Hamblen; see Ocha v. State, 826 So.3d 956,964-65(Fla.2002); Boyd v. State, 910 So.2d 167,190(Fla.2005). Under current Florida law, the trial judge has the discretion to appoint independent counsel to present mitigating evidence [see Muhammad v. State, 782 So.3d 343,363-64(Fla.2001); Barnes v. State, 29 So.3d 1010,1022-26(Fla. 2010)], but he or she also has the discretion not to do so [Muhammad; see Hamblen; Durocher v. State, 604 So.2d 810(Fla. 1992)], and up to now this Court has not adopted any articulable standards to guide that discretion. See Part G, infra.

In any event, in denying undersigned appellate counsel's motion to withdraw, the four Justice majority - - quoting Goode v. State, supra, 365 So.2d at 384 - - reemphasized that "even though [the defendant] expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposi-

tion of the death sentence complies with all the standards set by the Constitution, the Legislature, and the courts." Robertson, 2014 WL 3360330, p.1. This automatic review is "critical to the maintenance of a constitutional capital sentencing scheme in this state". Id, p.1. Three of the Justices in the majority, in a separate concurring opinion, wrote:

> [T]his Court has long explained that its review of death penalty cases under article V, section 3(b)(1), of the Florida Constitution and section 921.141, Florida Statutes, "begin[s] with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809,811 (Fla.1988)(citing State v. Dixon, 283 So.2d 1,7(Fla. 1973)). As further stated by this Court in describing its appellate review of capital cases, 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." Id. This is actually of particular concern when the defendant expresses a desire to be executed because "it is not necessarily those most deserving of the death penalty (e.g., the most aggravated and least mitigated) who seek its imposition." Muhammad v. State, 782 So.2d 343,369(Fla.2001)(Pariente, J., specially concurring).
>
> The American Bar Association's Standards for Criminal Justice and Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases -- which provide a guide to determining the reasonableness of attorney conduct, see Rompilla v. Beard, 545 U.S. 374,387(2005) - - specifically explain that a defendant's stated desire to plead guilty or be executed cannot form the basis for an attorney's competent representation of the defendant. See e.g., ABA Standards for Criminal Justice 4-4.1 (providing that defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty, and that this duty exists regardless of the defendant's stated desire to plead guilty). In fact, the death penalty standards explicitly state that it is "ineffective assistance for counsel to simply acquiesce" to a client's desires to be executed. ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases 10.5 cmt. In other words, not only does the client have no right to commit state-assisted suicide but it is actually ineffective -- and therefore unethical - – conduct for an attorney

to accede to this request.

Robertson, 2014 WL 3360330, p.5-6 (Pariente, J., joined by LaBarga, C.J., and Perry, J., concurring).

Importantly, the A.B.A. Standards (and Rompilla v. Beard, 545 U.S. 374(2005)) are primarily focused on trial court death penalty proceedings. See also Henry v. State, 937 So.2d 563,573(Fla. 2006)("Certainly, both Wiggins [v. Smith, 539 U.S. 510(2003)] and the A.B.A. Guidelines for Appointment and Performance of Counsel in Death Penalty Cases §10.11(rev.ed.2003) on counsel's duties mandates mitigation investigation and preparation, even if the client objects").

In the instant case, Mr. DeSisto went much further than "simply acquiesc[ing]" to Robertson's desire to be executed; his role - - as he performed it - - was as a zealous advocate for Robertson's execution. There was a complete absence of adversarial testing of the state's case. See Clark, 690 So.2d at 1283. Robertson's stated goal was to ensure a "rock solid" plea and sentencing proceeding to "stave off" grounds for reversal on appeal. What he and Mr. DeSisto inadvertently achieved was the opposite. Through the various shortcuts taken, the death sentence which Robertson so adamantly wanted fails to comply with the procedural and substantive standards set by the Constitution, the Legislature, and the courts.

In this non-adversarial (indeed collaborative) proceeding, everyone was on the same page. The prosecutor urged the death penalty; the defense attorney urged the death penalty; the correctional probation officer who prepared the PSI urged the death penalty (and in so doing violated the rule of procedure which

governs PSIs in capital cases where the defendant waives mitigation)[Part C, infra]; the defense attorney - - acceding to Robertson's demand - - did no investigation of potential mitigating circumstances [Part B]; the defense attorney and the trial judge failed to comply with the requirements of Koon v. Dugger, 619 So.2d 246,250(Fla.1993)[Part B]; the record strongly indicates that the trial judge predetermined that she would impose the death sentence - - and that she actually prepared the written sentencing order - - before the plea and sentencing hearing even took place [Part E]; and the judge improperly gave great weight, in imposing the death sentence, to Robertson's wishes and intent [Part F].

Even in Hamblen v. State, supra - - which has spawned great confusion and inconsistent results over the past 26 years and should be clarified if not receded from [Part G] - - the majority recognized that the courts of this state cannot administer the death penalty by default. 527 So.2d at 804. Despite Robertson's and DeSisto's acquiescence - - and even despite their insistence - - it was serious error for the trial court to dispense with the responsibilities and procedures established in our constitution, statues, rules of procedure, and this Court's precedent. This fiasco of a penalty proceeding, resulting from a combination of judicial error and ineffective (and unethical) representation, cannot be remedied by postconviction motion because there will be no postconviction motion; Robertson can waive that. See, e.g. Durocher v. Singletary, 623 So.2d 482 (Fla.1993) If this Court's automatic direct appeal of all death sentences - - the importance of which was reaffirmed last month in Robertson's own case - - is

to be meaningful, this death sentence must be reversed now, and remanded (in the event the state again seeks the death penalty) for a new penalty proceeding which complies with the applicable precedent, statutes, rules, and constitutional provisions.

B. Failure to Investigate Mitigation, and Non-Compliance with Koon

An attorney's client has no right to commit state-assisted suicide, and it is both ineffective and unethical for the attorney to accede to such a request. Robertson, 2014 WL 3360330(Fla., July 10, 2014)(Pariente, J., joined by LaBarga, C.J and Perry, J., concurring)(citing ABA Standards for Criminal Justice 4-4.1 and ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.5 cmt). This Court has repeatedly cautioned that a capital defendant's waiver of mitigation does not relieve his trial counsel of his duty to investigate. See e.g., Henry v. State, 937 So.2d 563, 570 and 573(Fla. 2006)(citing Wiggins v. Smith, 539 U.S. 510(2003) and the ABA Guidelines); Grim v. State, 971 So.2d 85,100(Fla.2007); Ferrell v. State, 29 So.3d 959, 982(Fla. 2010); Wyatt v. State, 71 So.3d 86,108-09(Fla.2011); Krawczuk v. State, 92 So.3d 195,204(Fla. 2012). In other words, counsel cannot merely "latch on" to his client's suicidal instructions. See Blanco v. Singletary, 943 F.2d 1477,1501-03(11th Cir.1991); Coleman v. Mitchell, 268 F.3d 417,450(6th Cir.2001). For example, in Koon v. Dugger, 619 So.2d 246,250(Fla.1993) - - the case in which this Court established the prospective rule requiring counsel to inform the trial court on

the record whether, based on his investigation, he reasonably believes there would be mitigating evidence which could be presented, and what that evidence would be - - this Court observed:

> In contrast to Blanco, this is not a situation in which counsel "latched onto" the defendant's instruction and failed to investigate penalty phase matters, [Defense counsel] O'Steen investigated potential mitigating evidence before trial. He reviewed the 1982 psychiatric reports and talked with Dr. Wald regarding guilt and penalty phase issues. In addition, O'Steen knew about Koon's family history, his background, and his chronic alchoholism. O'Steen testified that he talked with Koon about presenting penalty phase witnesses. Although O'Steen did not present penalty phase testimony, he argued the existence of mitigating factors based upon testimony presented in the guilt phase. O'Steen argued that Koon lacked the capacity to conform his conduct to law due to his intoxication; that Koon was a good father, a good provider, and a hard worker; and that Koon was generous toward his friends. Under these facts, we find no error in O'Steen following Koon's instruction not to present evidence in the penalty phase.

Similarly, in Grim v. State, 971 So.2d at 100, upon learning that the defendant intended to waive mitigation, the trial court conducted a Koon inquiry, in which:

> [Defense attorney] Rollo proffered the following mitigating evidence: testimony and a report from [Dr.] Larson that two statutory mental mitigators applied; testimony from Larson as to nonstatutory mitigation, including various aspects of Grim's childhood; testimony from two of Grim's supervisors as to his good employment history; testimony from Grim's mother, sister, and stepfather as to his "chaotic childhood," that he was a good student, and that he was loving and caring; and testimony as to stress in Grim's life at the time related to his marriage.

The trial court then examined Grim, who confirmed that the decision to waive mitigation was his alone, and against the advice of counsel. The court then found that Grim's waiver was knowing and voluntary, and that defense attorney Rollo had "complied with the duties to investigate and have witnesses ready to testify."

971 So.3d at 100. On appeal, this court wrote:

> We have recognized that a defendant's waiver of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed. See, e.g., State v. Lewis, 838 So.2d 1102,1113(Fla.2002)("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision."). However, unlike other cases where we have concluded that counsel's failure to adequately investigate mitigation rendered the defendant's waiver invalid, e.g., Lewis, 838 So.2d at 1113-14, the record here does not support a claim of failure to investigate. Rollo testified that, despite his client's wishes, he recognized he still had a duty to develop mitigation. He did not latch onto Grim's desire not to present mitigation, but instead, repeatedly tried to dissuade him. Rollo's proffer reveals he uncovered a substantial amount of mitigation. Further, he filed a motion to appoint Dr. Larson as a mental health expert several months before trial and contacted Grim's mother, sister, stepfather, and two supervisors.

971 So.2d at 100-01(emphasis supplied).

See also Chandler v. State, 702 So.2d 186,200(Fla.1997)(trial court complied with Koon requirement, and defense counsel satisfied his duties under Koon "by investigating Chandler's background, having witnesses ready and available to testify, and adequately outlining the favorable character evidence that [the] witnesses would have presented); Power v. State, 886 So.2d 952,962(Fla.2004)(trial counsel "continued to conduct an investigation into Power's background even though Power said that he did not want such information presented"); Dessaure v. State, 55 So.3d 478,484(Fla.2010)("despite Dessaure's insistence that he did not want a penalty phase and despite his lack of cooperation . . . defense counsel investigated all possible mitigation in preparation for the penalty phase", and proffered the mitigating evidence

to the trial court); Reynolds v. State, 99 So.3d 459,495 (Fla. 2012)(notwithstanding Reynolds' decision to waive mitigation and his lack of cooperation, defense counsel interviewed Reynolds' two sisters to obtain information about his family background, and obtained family photographs, school records, and medical records).

> In Koon v. Dugger, 619 So.2d 246(Fla.1993), this Court outlined the procedure that must be followed when a defendant waives the presentation of mitigating evidence:
>
> > [C]ounsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Clark v. State, 35 So.3d 880,889(Fla.2010)(emphasis supplied).

The Koon requirement clearly presupposes that there will be an investigation. The ABA Standards and Guidelines require the same thing. Robertson v. State, 2014 WL 3360330(Fla.2014) (Pariente, J., joined by LaBarga, C.J. and Perry, J., concurring), p.6. A defendant's wish to commit state-assisted suicide cannot form the basis for an attorney's competent representation; it is ineffective conduct and unethical conduct to simply acquiesce to the defendant's desire to be executed. Id, at 5-6.

In the instant case, Robertson - - in his sworn affidavit notarized by Mr. DeSisto - - not only waived the presentation of mitigating evidence, but further instructed Mr. DeSisto "not to retain a mitigation expert to do any type of investigation to avoid finding facts" which might outweigh the aggravating circum-

stances (1/168). Further, "[m]y attorney has informed me the Court has a duty to review the entire record and any source for mitigation evidence despite my request to have none presented. Nonetheless, unless under Order of the Court, I have instructed him not to provide anything that could possibly preclude me from being sentenced to death" (1/168, emphasis supplied).

From the entirety of the record, and from the overall pattern of Mr. DeSisto's conduct of this case, it is reasonable to believe that he followed Robertson's instructions. In any event, compliance with the Koon procedure requires the defense attorney to affirmatively place the results of his investigation on the record, by disclosing to the trial judge whether he reasonably believes there to be mitigating evidence which could be presented, and what that evidence would be. Only then can the trial judge accept the defendant's waiver.

In the instant case, Robertson's directive to Mr. DeSisto not to provide anything to the trial judge which might possibly preclude a death sentence amounted to instructing him not to comply with Koon absent a court order. Accordingly, Mr. DeSisto did not comply with Koon, nor did Judge Greider undertake a Koon inquiry on her own. DeSisto merely said:

> The only thing I'd bring to the Court's attention, which I'm sure the Court is aware, but just to make the record again, the - - under [K]oon versus D[ug]ger, 619 So.2nd, 246 Florida 1993, which I previously provided to counsel and the Court.
>
> The Court must discuss the waiver of mitigation by defense counsel that was the defendant's wish. That no mitigation would be done on his behalf. And the Court further has the obligation under M[u]hamm[a]d versus State, 782 So.2nd,343 Florida 2001, emphasizing that the duty of the Court is to consider all mitigating evi-

dence anywhere in the record.

THE COURT: I have, and I will.

MR. DESISTO: I know you will, Your Honor.

(2T/69)(emphasis supplied)

Shortly thereafter, Judge Greider asked Robertson whether he reaffirmed under oath his waiver of his right to present evidence in mitigation, and Robertson replied "Yes, Your Honor" (2T/72). At no point did DeSisto indicate whether, based on his investigation, he believed there to be mitigating evidence which could be presented or what that evidence would be. Nor did Judge Greider ask him for that information. Mentioning Koon is not the same thing as complying with Koon.

Especially when considered alongside all the other "death-by-default" shortcuts taken in this case, the failure to comply with the mandatory Koon procedure is judicial error requiring reversal on direct appeal. And to the extent that DeSisto's acquiescence to Robertson's instruction not to do any mitigation investigation amounts to ineffective and unethical conduct, as a practical matter that cannot be remedied later by means of a postconviction motion, because (1) DeSisto did what Robertson wanted him to do [see, e.g., Krawczuk v. State, 92 So.3d at 205], and (2) Robertson can waive all postconviction proceedings [see Durocher v. Singletary, 623 So.2d at 482-85]. Therefore, in order for this Court to prevent Florida's death penalty law from being used as a vehicle for state-assisted suicide; in order to make certain that trial attorneys understand what is required of them when their client insists on being put to death; and in order to ensure that

all death sentences in this state comply with the procedural and substantive standards set by the state and federal constitutions, Florida's death penalty statute, and prior decisions of this Court, the Court - - on automatic direct appeal - - must reverse Robertson's death sentence and remand for further proceedings which meet those standards.

C. The PSI

In Muhammad v. State, 782 So.2d 343,365(Fla.2001), this Court was confronted with "a perfect example of why the defendant's failure to present mitigating evidence makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases."

> In the past, we have encouraged trial courts to order the preparation of a PSI to determine the existence of mitigating circumstances "in at least those cases in which the defendant essentially is not challenging the imposition of the death penalty." Farr v. State, 656 So.2d 448,450(Fla.1995)("Farr II"); see Allen v. State, 662 So.2d 323,330 (Fla.1995). Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background.

782 So.2d at 363-64.

In addition to the required comprehensive PSI, the Court in Muhammad noted that the trial judge could, in his or her discre-

tion, either (1) appoint independent counsel to present the mitigation as was done in Klokoc v. State, 589 So.2d 219(Fla.1991) [see also Barnes v. State, 29 So.3d 1010,1022-26(Fla.2010)]; or (2) utilize standby counsel for this purpose; or (3) call persons with mitigating evidence as Court witnesses. 782 So.2d at 364.

Subsequently this Court amended Florida Rule of Criminal Procedure 3.710 to add a new subdivision (b), which provides:

> **Capital Defendant Who Refuses to Present Mitigation Evidence.** Should a defendant in a capital case choose not to challenge the death penalty and refuse to present mitigation evidence, the court shall refer the case to the Department of Corrections for the preparation of a presentence report. The report shall be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background.

The Court explained that this requirement is based on its decision in Muhammad, and:

> Although the new subdivision provides that the PSI "should include information such a previous mental health problems (including hospitalizations), school records, and relevant family background," this is not intended to be a conclusive list of items that should be in the report. It is simply offered as a list of examples.

Amendments to the Florida Rules of Criminal Procedure, 886 So.2d 197,199(Fla.2004).

> Finally, in order to provide additional guidance to the Florida Department of Corrections, the following committee note, which we have modified slightly for clarity, has been added to the rule:
>
> > The amendment adds subdivision (b). Section 948.015, Florida Statutes, is by its own terms inapplicable to those cases described in this new subdivision. Nonetheless, subdivision (b) requires a report that is "comprehensive." Accordingly, the report should include, if reasonably available, in addition to those matters specifically listed in Muhammad v. State, 782 So.2d 343,363(Fla.2001), a description of the status of all of the charges in the indictment

> as well as any other pending offenses; the defendant's medical history; and those matters listed in sections 948.015(3)-(8) and (13), Florida Statutes. The Department of Corrections should not recommend a sentence.

Amendments to the Florida Rules of Criminal Procedure, supra, 886 So.2d at 199 (emphasis supplied).

(1) Assuming arguendo that a PSI prepared by a Department of Corrections officer can ever serve the purpose envisioned in Muhammad of providing a comprehensive and unbiased source of information for the trial judge to use in capital sentencing, it could not and did not serve that purpose in the instant case. Moreover, (2) the PSI prepared by correctional probation senior officer Gottfried in the instant case was not "comprehensive", in that it did not include the information and records required by Muhammad and Fla.R.Crim.P. 3.710(b), and (3) here, the PSI actually violated the neutrality expected under the rule by not only recommending a sentence (of death), but by doing so in a flagrantly adversarial manner.

Robertson has been an inmate in Florida Department of Corrections facilities for more than three decades. The homicide for which he was facing a possible death sentence occurred in a state prison, and was investigated by the DOC's Office of the Inspector General. When interviewed during that investigation, Robertson (who at that time was denying that he killed his cellmate Hart) complained that his request for a cell change had been ignored, and that an Officer Norris had told him that Hart was a child molester. Robertson said he thought that Officer Norris may have wanted him to do something bad to Hart (2/200; see PSI 1/37, p.3). Much of Robertson's subsequent disagreement with his attorneys

(prior to DeSisto) who represented him on the second-degree murder charge stemmed from Robertson's wanting to run the "defense" that the homicide was DOC's fault because they knowingly put them in the same cell together although both asked to be moved, and because Robertson believed that correctional officers wanted him to harm Hart (see SR 27,42,70-77,80-82,86-87,90-95,112-16,118-20; PSI 1/37, p.12; Dr. Silver's sanity evaluation 1/22, p.3).

Then, in December 2011, Robertson attacked a correctional officer in the Charlotte County Jail, with the intent - - according to him - - of getting his keys so he could unlock a cell and kill an inmate. This incident resulted in charges - - pending at the time Officer Gottfried prepared the PSI - - of attempted murder and attempted robbery (PSI 1/37, p.10).

Under these circumstances, it is hard to imagine how a DOC officer could prepare an unbiased PSI. Even more importantly, the PSI prepared by Officer Gottfried shows on its face that it was not unbiased, but rather that the DOC had its own agenda. Gottfried argued like a prosecutor might:

> When we examine the definition of society we see that it is an aggregate of people living together in a more or less ordered community. The community of people living in a particular region and having shared customs, laws and organizations. In reviewing this definition it is obvious that there is no place in our society for James Robertson. He is cold and calculating and dictates his own terms and conditions. Even now, he dictates the condition of the death penalty since he no longer wants to remain confined in Close Management.
>
> Inmate Robertson is the picture of recidivism, he is one inmate who shows that incarceration does not rehabilitate in all cases.
>
> Although Frank Richard Hart was an inmate, he was a human being and was murdered by this offender to make a statement and this offender has absolutely no remorse

> for what he has done. He actually blames this crime on the Department of Corrections. Psychological evaluations have shown that he has stated it is the fault of the prison guards and the Department of Corrections for the death of his cellmate. He explained that he shared a cell with the victim for four (4) months. He said that the victim was manic and had psychological problems and he neglected personal hygiene and took drugs. He stated that he often encouraged the victim to bathe and to clean up his area of the cell. He stated that the guards told him that the cellmate was a pedophile. He believed that the guards wanted him to injure the victim. He stated that he felt like he was being used.
>
> The Department of Corrections does believe in rehabilitation, but there are times when there is no hope for this to occur. We are now faced with an inmate who is incorrigible, unable to conform and is still dictating what he wants as an outcome of this sentencing.

(PSI 1/37,p.12)(emphasis supplied)

Then, contrary to the applicable provision that the Department of Corrections should not recommend a sentence, the DOC, through Officer Gottfried, recommended that Robertson be sentenced to death (PSI 1/37,p.12). Gottfried noted that this was "merely a recommendation" and was not intended to "reward [Robertson] by recommending the sentence that he so desperately wants"; the ultimate decision was up to the court. Id, p.12.

Since the Department of Corrections is an arm of law enforcement[8], and correctional officers are - - for most purposes - -

[8] See, e.g., Tormey v. Moore, 824 So.2d 137,141(Fla.2002)(finding portions of the Law Enforcement Protection Act violative of single-subject rule; Tormey was receded from in part in Franklin v. State, 887 So.2d 1063,1075 n.23(Fla.2004)), quoting the preamble to that act, "The Legislature finds that law enforcement officers, correctional officers, state attorneys, and assistant state attorneys occupy a unique position in civilized society. As the first line of defense against lawlessness and violence, they are charged with the duty of protecting the citizens and enforcing the laws of this state.

considered to be law enforcement officers[9] - - it is doubtful at best whether a PSI prepared by the DOC could ever adequately serve the purpose contemplated in Muhammad of obtaining and presenting available mitigating evidence when the defendant refuses to allow his attorney to do so. But in any event, the PSI could not fulfill that purpose under the circumstances of the instant case, where both the murder and the subsequent attempted murder occurred in prison or jail; where the deceased victim was an inmate and the surviving victim of the later crime was a jail guard; where the DOC conduced the homicide investigation; and where the defendant had accused correctional officers of negligent if not deliberate complicity in putting Frank Hart in harm's way. Under these unique circumstances - - even if this Court generally adheres to its Hamblen / Muhammad position that the trial court may appoint special mitigation counsel but is not required to do so [see Part G, infra] - - it was an abuse of discretion for Judge Greider to fail to appoint special counsel and instead rely on this inadequate and biased PSI.

The PSI was inadequate because it did not meet the standards for a comprehensive presentence investigation as outlined in Muhammad and Rule 3.710(b). Although both Dr. Silver and Dr.

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[9] See e.g., Fla.Stat.§784.07(1)(d); McLaughlin v. State, 721 So.2d 1170(Fla.1998)(statute reclassifying assault or battery when committed against a law enforcement officer "sets forth a comprehensive list of 'law enforcement officers'", which include correctional officers and correctional probation officers); Anderson v. State, 798 So.2d 764(Fla.2nd DCA 2001); State v. Evans, 705 So.2d 631,632(Fla. 3d DCA 1998). See also the compilation of Florida statutes defining law enforcement officers in Ward v. State, 965 So.2d 308,310(Fla.3d DCA 2007), quashed on other grounds, 7 So.3d 520(Fla.2009).

Schaerf had noted that Robertson had made a nearly successful suicide attempt while in prison in 1998, which resulted in several weeks hospitalization and a change in the psychiatric medications he had been receiving (1/22, p.3; 1/23, p.5), and although on at least one occasion around the same period of time he suffered what Dr. Schaerf described as "clearly a hypnogognic hallucination" involving a helicopter over his cell (1/23, p.4-5; see 1/22, p.3), none of Robertson's prison medical records, and specifically none of the records from his hospitalization after the suicide attempt, were obtained. Similarly, although the PSI indicates that Robertson dropped out of school after the 8th grade (later obtaining a GED in prison), no school records were provided to the trial court. Officer Gottfried indicated that he examined prior records, although it appears that those records consisted of prior post-and-pre-sentence investigations and psychological reports, rather than the school records themselves (see PSI 1/37, p.7 and 10-11); "From examining prior records, it was ascertained that the offender never failed in school, although he was in a few special classes. From the first to the third grade he could not sit still and he got in trouble at school for being late to class and hanging out in the bathroom. He stated that in school he liked History and Art but had a lot of difficulty with Math and Science" (PSI 1/37, p.11).

The PSI contains no indication of Robertson's IQ score, or whether he was ever diagnosed with ADHD or another learning disability. Of the "background" mitigation considered by the trial judge, the only ones related to learning capacity were "(b)

in early childhood, Defendant was very hyper" and "(e) Defendant obtained his GED in 1982 while in prison" (2/224). The judge found (and gave little weight to) the following self-report by Robertson: "Defendant stated he had been very hyper as a child; this hyperactivity could be a sign of an underlying disorder" (2/224)(emphasis supplied). However, due to Officer Gottfried's failure to obtain and submit Robertson's actual school records and medical records, the trial judge did not know - - and this Court does not know - - whether Robertson has ever been diagnosed with an underlying disorder, or a severe learning disability, or whether he has a low IQ.

"The rationale behind this Court requiring a comprehensive PSI is to allow the trial court to have before it all the available information regarding the defendant"; it is the substance, not the form, which is important. Fitzpatrick v. State, 900 So.2d 495,524(Fla.2005). See also Ocha v. State, 826 So.2d 956,967 n.3(Fla.2002)(Pariente, J., joined by Anstead, J., concurring in result only as to sentence)(although a PSI was done in the case, it was not comprehensive and it "appears to be based largely on conversations with Ocha"; however, the Muhammad procedure is prospective and Ocha's penalty proceeding took place before the requirement went into effect).

D. No Objection

The state will undoubtedly argue that undersigned counsel's contention that the PSI was inadequate, biased, and improperly recommended a sentence was not preserved by an objection below. See McKenzie v. State, 2014 WL 1491501(Fla., April 17, 2014),

p.13. For that matter, none of the errors, shortcuts, and failures to comply with the applicable rules and procedures discussed in this brief were objected to below, for the obvious reason that both Robertson and his attorney DeSisto were totally on board with his receiving a death sentence as quickly and expeditiously as possible. The only things Robertson has objected to so far are having an appeal and being represented by the undersigned, and it can be expected that he will object vociferously to every argument made in this brief. The proceeding in the trial court was such an Alice in Wonderland affair that it was the prosecutor who objected to (or at least cautioned the trial court to disregard) defense counsel's emphasis on Robertson's lack of remorse and his future dangerousness.

Under these unusual - - even bizarre - - circumstances, using the contemporaneous objection rule to bar appellate review would completely defeat the purpose - - recently reaffirmed in Robertson's own case - - of requiring a direct appeal with counsel even when the capital defendant adamantly doesn't want one. Even when the defendant requests or demands to be executed, this Court must ensure that the death sentence complies with all of the standards set by the federal and state Constitutions, the Florida legislature, and applicable decisions of the U.S. Supreme Court and this Court. Goode, 365 So.2d at 384. Even when the defendant waives mitigation, Florida courts cannot "administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence."

Hamblen, 527 So.2d at 804.

Even though Hamblen allows a competent capital defendant to forbid his attorney from presenting mitigating evidence (although it does not preclude the trial judge from appointing special counsel - - even over the defendant's objection - - to present mitigating evidence; see Klokoc; Muhammad; Barnes), it is highly unlikely that the Hamblen majority intended to countenance a death penalty proceeding where the defense attorney, appointed at public expense, affirmatively and aggressively pursues a death sentence for his client. As Justice Pariente emphasized in her concurring opinion in the instant appeal on undersigned counsel's motion to withdraw, such conduct would be ineffective, unethical, and in violation of the ABA standards and guidelines. Yet it is exactly what occurred in the trial court in Robertson's case. Obviously, Mr. DeSisto - - believing that his role was to help Robertson "at all costs" get the death sentence he "wanted after so long" (1/146-47) - - was not going to object to any errors in the process no matter how egregious. In fact, it was the stated intention of the attorney and client to "stave off reversal under the automatic appellate review" (1/167). One way to "stave off reversal", DeSisto certainly must have perceived, is not to object to anything.

If serious errors in the death sentencing process were barred from review because a defendant determined to commit state-assisted suicide, and an attorney committed to the helping him do just that, failed to object, then the direct appeal required by Florida law would become a meaningless formality; nothing more

than death by default.

E. Judge Greider's Precommitment to Impose a Death Sentence

"[D]ue process under Florida's capital sentencing procedure requires a trial judge who is not precommited to a life sentence or a death sentence . . ." Porter v. State, 723 So.2d 191,196 (Fla. 1998). This impartiality is an essential ingredient in the constitutionality of Florida's death penalty statute. Porter, at 196. Even in noncapital cases, trial judges may not predetermine the defendant's sentence. As this Court recognized in Thompson v. State, 990 So.2d 482,491(Fla.2008):

> . . .[I]t is absolutely essential that a judge be and remain impartial prior to the commencement of sentencing proceedings when the positions of the respective parties will be presented and considered by the court. [Citations omitted]. However, the statements the trial judge made here at the hearing on the motion to withdraw suggest that the judge had a preconceived and fixed view as to what sentence Thompson would receive if he was convicted. In light of such prejudgment expressed by the trial judge at the outset of the proceedings, we conclude that counsel's failure to timely disqualify the judge rendered the result of Thompson's sentencing unreliable, and our confidence in the sentence ultimately imposed upon Thompson has been sufficiently undermined to merit relief under Strickland. Cf. Porter v. State, 723 So.2d 191, 196(Fla.1998) (holding that the judge's impartiality did not satisfy the constitutional requirement that the sentencer of a capital defendant be impartial and not predisposed to a sentence of either life or death).

See also Randolph v. State, 853 So.2d 1051,1059(Fla.2003), in which this Court rejected a capital defendant's postconviction claim that the trial judge improperly predetermined his sentence because "[t]here is no evidence in the record, besides [law clerk] Kohler's opinion, that Judge Perry determined Randolph would

receive a death sentence prior to the sentencing proceedings."

In the instant case, in contrast, the record strongly - - nearly conclusively - - indicates that Judge Greider prepared the written sentencing order, based on the reports and documents submitted to her, before the plea and sentencing hearing was held. Essentially it was capital sentencing by summary judgment. The only other barely conceivable possibilities are either (1) that her oral pronouncement of sentence (which was nearly identical to the written order) was extemporaneous and was later that day reduced to writing from the electronic recording or the court reporter's notes (which would also be improper and would require a remand for imposition of a sentence of life imprisonment; see Perez v. State, 648 So.2d 715, 719-20(Fla.1995)), or (2) that the judge was somehow able to think through her sentencing decision and prepare the detailed 8-page written sentencing order during an 11 minute mid-afternoon break (see 2T/69-70; 2/217). The language used by Judge Greider in the written sentencing order also indicates that it was prepared earlier, in that there is no reference to the plea and sentencing hearing, or anything that took place in that hearing, including the testimony of the state's sole witness, Officer Gottfried. To the contrary, the order begins, "This cause comes before the Court on Defendant's stated intention to enter a plea of guilty to premeditated murder so that he can receive the death penalty" (2/219; see 2T/71)(emphasis supplied). "Stated intention" to enter a plea pretty clearly refers to something she expects to happen, rather than something that just happened within the last hour and 20 minutes (see 2T/69).

In Grossman v. State, 525 So.2d 833,841 (Fla.1988), this Court established a procedural rule - - which became effective on June 24, 1988 - - "that all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." A trial judge's failure to comply with this rule requires that the death sentence be vacated and the case remanded for imposition of a sentence of life imprisonment. See Christopher v. State, 583 So.2d 642,646-47(Fla.1991); Perez v. State, 648 So.3d 715,719-20(Fla.1995); Gibson v. State, 661 So.2d 288,292-93(Fla.1995). As recognized in Christopher, "Our holding in this regard is more than a mere technicality"; rather, it is necessary to ensure that any death sentence be the result of the reasoned weighing process which due process and Florida's capital sentencing statute mandate. 583 So.2d at 646-47.

[Plainly, then, if Judge Greider's oral pronouncement of the death sentence was extemporaneous and later reduced to writing, reversal for a life sentence is required].

A second, corollary, prospective rule was adopted by this Court five years later in Spencer v. State, 615 So.2d 688,690-91(Fla.1993)(emphasis supplied):

> In Grossman, we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings. First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State an opportunity to be heard; b) afford, if appropriate, both the State and the defend-

> ant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. Such a process was clearly not followed during these proceedings.

In Happ v. Moore, 784 So.2d 1091, 1103 n.12(Fla.2001) - - a postconviction habeas corpus proceeding arising from a trial and penalty phase which took place before Spencer's prospective rule became effective - - the Court wrote that "[t]he obvious import of our decisions in Grossman and Spencer was to ensure that trial judges take the time to consider all relevant circumstances and arrive at an informed decision uninfluenced by haste and initial impressions. While Spencer had not yet been decided, we are troubled by the fact that the trial court here had prepared a sentencing order before the jury had even issued its recommendation."

In the instant case, even more egregiously than in Happ, it appears that the trial judge prepared the sentencing order before Robertson was even convicted of the charged murder. While it may have been Robertson's "stated intention" to plead guilty in order to receive the death penalty, and while he had submitted a sworn affidavit asserting his desire to waive everything he could possibly waive in order to achieve that result as quickly as possible, the wishes of a death-seeking defendant do not absolve the trial judge of his or her obligation to abide by this Court's

capital sentencing rules. See Hamblen, 527 So.2d at 804; Goode, 365 So.2d at 384. Nor do the defendant's wishes provide an exception to the due process requirement that the sentencing judge be impartial and not be precommitted (or even predisposed) to a death sentence or a sentence of life imprisonment. See Porter, 723 So.2d at 196; Thompson, 990 So.2d at 491; contrast Randolph, 853 So.2d at 1059. "The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence." Hamblen, at 804. And in this case, at the time Judge Greider evidently prepared the order sentencing him to death, Robertson actually was "the accused"; he had not yet pled guilty (though he'd made clear his intention to do so); the colloquy in open court from which the judge would determine the knowing and voluntary nature of the plea had not yet occurred; defense counsel had not yet complied (nor, as it turned out, would he ever comply) with the Koon requirement of informing the trial court whether, based on his investigation, he reasonably believed there was mitigating evidence which could be presented, and what that evidence would be; and the penalty phase evidence had not yet been introduced and the arguments of counsel had not yet been heard. By deciding to impose a death sentence and preparing the written order before the combined plea and sentencing hearing took place -- apparently based on the documents and affidavits which had been submitted to her - - the trial judge essentially entered a summary judgment; yet another "death by default" shortcut of the sort which rendered this capital sentencing proceeding fatally defi-

cient under Florida law and the state and federal constitutions.

In summary, whether Judge Greider's written sentencing order was prepared before the plea and sentencing hearing, or whether the oral pronouncement of sentence was extemporaneous and later reduced to writing, reversal is required in either event. The state may argue that the sentencing order could have been prepared during the 11 minute mid-afternoon break. Undersigned counsel believes that this Court, upon reading the sentencing order (2/219-26), will agree that it would be physically and mentally impossible for the judge to have prepared this order in 11 minutes. Moreover, if the purpose of this Court's Grossman and Spencer decisions was "to ensure that trial judges take the time to consider all relevant circumstances and arrive at an informed decision uninfluenced by haste and initial impressions" [Happ v. Moore, 784 So.2d at 1103 n.12], that plainly could not have taken place during 11 minutes of frenetic writing or typing. However, if this Court believes that there is a possibility that Judge Greider might have prepared the sentencing order during the 11 minute break then it should remand for an evidentiary hearing to determine whether or not she did so. [Such a determination cannot be made on a postconviction motion because - - as previously discussed - - Robertson can and undoubtedly will waive that].

F. Defendant's Wishes and Intent

Under Florida's capital sentencing law, first the penalty jury (unless, as here, a jury is waived) and then the trial judge is to weigh the aggravating circumstances against the mitigating circumstances to determine whether the appropriate penalty is

death or life imprisonment. Fla.Stat. §921.141(3)(4)(6) and (7). As this Court recognized forty years ago, "The most important safeguard presented in [Florida's capital sentencing statute] is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." State v. Dixon, 283 So.2d 1,8(Fla.1973)(emphasis supplied). "Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be 'guided and channeled' by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Miller v. State, 373 So.2d 882,885 (Fla.1979). Under long-established Florida law, aggravating factors are strictly limited to those enumerated in the stat-ute, and courts must guard against any unauthorized factor weighing into the life-or-death equation. Miller v. State, supra, 373 So.2d at 885; see, e.g., Odom v. State, 403 So.2d 936,942 (Fla. 1981); McCampbell v. State, 421 So.2d 1072,1075(Fla.1982); Geralds v. State, 601 So.2d 1157,1162 (Fla.1992); Tanzi v. State, 964 So.2d 106,117(Fla.2007).

A capital defendant's wish to die - - more specifically, as here, his intent to commit state-assisted suicide because "the state took his freedom and they should have the responsibility of killing him"[10] - - is not an authorized aggravating factor, any more than a normal defendant's wish to live should be considered

[10] See Dr. Schaerf's forensic psychiatric evaluation, 1/37,p.5.

much of a mitigating factor.[11] While, for obvious reasons, no existing Florida caselaw deals with the bizarre situation where a trial judge, in imposing a death sentence, gives great weight to the defendant's death wish, the obverse situation was cogently discussed by the Supreme Court of South Dakota in State v. Robert, 820 N.W. 2d 136,143 (S.D.2012)(emphasis supplied):

> Perhaps the obvious manner in which Robert fights so vigorously for his execution calls us to review the propriety of it. Robert's passion toward this end generates an examination of the manner in which the sentence was imposed. Robert's persistent efforts to hasten his own death necessitate intense scrutiny to guarantee his desire to die was not a consideration in the sentencing determination. We do not participate in a program of state-assisted suicide. "The State must not become an unwitting partner in a defendant's suicide by placing the personal desires of the defendant above the societal interests in assuring that the death penalty is imposed in a rational, non-arbitrary fashion." Grasso v. State, 857 P.2d 802,811 (Okla.Crim.App.1993) (Chapel, Judge, concurring). Indeed, had the sentencing determination been based in any degree on Robert's desire to die, the sentence may have been impermissibly imposed based on a non-statutory arbitrary factor – Robert's suicide wish. See Lenhard v. Wolff, 444 U.S. 807,815,100 S.Ct.29, 33,62 L.ED.2d 20(1979)(Marshall, J., dissenting). If that were the case, and the record revealed that the circuit court based its decision on Robert's desire to die, this Court would be obligated to reverse the sentence of death and remand for resentencing. See SDCL 23A-27A-13. It is not a statutory aggravating circumstance to invoke the death penalty. See SDCL 23A-27A-1. However, the circuit court went out of its way to make it clear that the sentencing decision was based in no part on Robert's desire to die. This Court can affirm the constitutional imposition of the death penalty imposed in accordance with our statutes; it will not sanction state-assisted suicide.

In the instant case, unlike Robert, Judge Greider went out of her way to make it clear that James Robertson's desire to die was a contributing factor, to which she accorded great weight, in her

[11] Note, however, that mitigating factors, unlike aggravating factors, are not limited to those enumerated in the statute.

(premature) decision to impose a death sentence. The first finding of her sentencing order reads:

> **(A) DEFENDANT'S WISHES AND INTENT:**
>
> Defendant has repeatedly expressed his wish to enter a plea of guilty to first degree murder, with the intention of receiving a sentence of death. At first appearance on June 11, 2009, Defendant stated that the charge should be first degree murder rather than second degree murder, because it was premeditated. Defendant stated in his October 19, 2012 affidavit that he wanted to plead guilty to first degree murder and receive a death sentence. He reiterated these statements to Dr. Silver according to Dr. Silver's October 19, 2012 report, and to Dr. Schaerf in Dr. Schaerf's report following his evaluation of defendant on November 2, 2012. The Pre-Sentence Investigation (PSI) report references a forensic psychiatric evaluation of Defendant on October 19, 2011, where Defendant indicated he had been "thinking about how to go to death row" since 2008. In his recorded statement taken on October 19, 2012, Defendant indicated he had been thinking about how to get the death penalty since July 2008, and after murdering his cellmate, when he realized he was being charged with second degree murder, he wrote to five individuals in the State Attorney's Office in 2009 indicating the murder was premeditated and requesting the death penalty. In the recorded statement, Defendant told the investigators that if he did not receive the death penalty, he would continue to kill until he received it. Accordingly, the Court assigns **great weight** to the Defendant's wishes and intent.

(2/219-20; see 2T/72-74)(emphasis in written order)

Later in the sentencing order, summarizing her findings and weighing them against each other, the judge reiterated that in addition to the statutory aggravators she "also gave great weight to Defendant's wish and intent to be put to death" (2/225; see 2T/85).

The fact that the layout of the sentencing order groups "(A) DEFENDANT'S WISHES AND INTENT" separately from "(B) AGGRAVATING CIRCUMSTANCES" (2/219-22) is of no import. Robertson's "wishes and intent" was given great weight in the judge's decision to

impose death, as were two of the statutory aggravators.[12] Either the "A" finding was an improper nonstatutory aggravator, or else the judge heavily weighed something which is neither an aggravator nor a mitigator as a reason to impose death. Either way, she committed an egregious error.

Judge Greider's weighty consideration of Robertson's death wish as a sentencing factor was not only improper under Florida law, it was also Eighth Amendment error [see Sochor v. Florida, 504 U.S. 527,532(1992); Espinosa v. Florida, 505 U.S. 1079,1082 (1992)], which cannot be written off as "harmless", because (1) while it may not have been dispositive of the judge's decision to impose a death sentence, it plainly contributed to her sentencing decision [see State v. DiGuilio, 491 So.2d 1129,1135(Fla.1986)], and (2) this Court cannot meaningfully reweigh the remaining aggravators against the mitigating circumstances due to defense counsel's abdication of his duty to investigate, and the trial court's and defense counsel's failure to comply with the requirements of Koon v. Dugger, 619 So.2d at 250 [see Part B, supra].

G. Under the Extreme Circumstances of this Case, the Trial Judge Abused her Discretion by Not Appointing Special Counsel to Investigate and Present Mitigation

This was the most harmonious and least contentious death penalty proceeding this Court is likely to see. Everybody was on the same page; the defendant, defense counsel, the prosecutors,

[12] The other two statutory aggravators were accorded moderate weight; indicating that Judge Greider considered them somewhat less important than Robertson's wishes in her decision to impose death.

the probation officer who prepared the PSI, all argued zealously in favor of a death sentence, and the trial judge evidently decided to impose that sentence and prepared the written order, even before the plea and sentencing hearing took place, based on documents, reports, the PSI, and the waiver affidavit submitted by Robertson and his attorney DeSisto. Instead, that affidavit - - in which, inter alia, Robertson stated that he had instructed his attorney to seek his indictment for first degree murder and further to seek the death penalty; that his intent was to ensure a "rock solid" plea and sentencing that could stave off reversal on appeal; that he had instructed his attorney not only to refrain from presenting mitigating evidence but also to refrain from investigating mitigating evidence, in order "avoid finding facts" which might be used to outweigh the aggravating factors which the trial court must find to impose a death sentence; and that he'd instructed his attorney to "work in concert with the State of Florida" to ensure that all aggravating factors were well-prepared and presented to the court (1/167-69) - - should have resulted in the appointment of special mitigation counsel.

If the defense attorney intended to comply with Robertson's instructions (as he did), his representation would be both ineffective and unethical:

> The American Bar Association's Standards for Criminal Justice and Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases- which provide a guide to determining the reasonableness of attorney conduct, see Rompilla v. Beard, 545 U.S. 374,387,125 S.Ct. 2456,162 L.Ed.2d 360(2005)-specifically explain that a defendant's stated desire to plead guilty or be executed cannot form the basis for an attorney's competent representation of the defendant. See e.g., ABA Standards for Criminal Justice 4-4.1

> (providing that defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty, and that this duty exists regardless of the defendant's stated desire to plead guilty). In fact, the death penalty standards explicitly state that it is "ineffective assistance for counsel to simply acquiesce" to a client's desires to be executed. ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases 10.5 cmt. In other words, not only does the client have no right to commit state-assisted suicide, but it is actually ineffective-and therefore unethical-conduct for an attorney to accede to this request.

Robertson v. State, 2014 WL 3360330(Fla.2014)(Pariente, J., joined by LaBarga, C.J. and Perry, J., concurring), p.6.

This Court has recognized that trial judges have the discretion to appoint special mitigation counsel - - not purporting to "represent" the defendant, and thus without violating any of his rights provided by Faretta v. California, 422 U.S. 806(1975) - - when the defendant's death-seeking behavior "impedes or prevents the trial court's exercise of its constitutional duty to provide individualized sentencing." Barnes v. State, 29 So.3d 1010,1022-26(Fla.2010). Robertson's extraordinary affidavit should have triggered such an appointment; not a premature decision to impose a death sentence. This Court should either (1) hold that the trial court's failure to appoint special counsel was, under the extreme circumstances of this case, an abuse of discretion, or (2) recede from the unworkable Hamblen decision which, over the years, has created great uncertainty and - - despite, or perhaps because of, this Court's efforts to fine tune it on a case-by-case basis - - has spawned much procedural litigation and has interfered with this Court's ability to conduct meaningful proportionality review, as well as the ability of trial courts to accurately weigh the

aggravating and mitigating circumstances before deciding whether to impose the death penalty or life imprisonment.[13]

Twenty-six years ago, undersigned counsel represented another death-seeking defendant, James Hamblen. As in the instant case, the undersigned's motion to withdraw was denied by this Court notwithstanding that "Hamblen made it clear that he did not want the case appealed". Hamblen v. State, 527 So.2d 800,802 and n.2(Fla. 1988). Since Hamblen's case, unlike Robertson's, was not riddled with substantive and procedural error, the undersigned raised only two issues, the second of which was an unsuccessful challenge to the CCP aggravator. The undersigned's main argument in Hamblen was summarized by this Court as follows:

> The first issue involves the friction between an individual's right to control his destiny and society's duty to see that executions do not become a vehicle by which a person could commit suicide. The main thrust of appellate counsel's argument is that the uniqueness of capital punishment demands that a defense to a death sentence be mounted, irrespective of the wishes of the defendant.
>
> Acknowledging that cases in which a defendant would manipulate the system in order to commit suicide are rare, counsel argues that safeguards are necessary to prevent its possibility. He asserts that these safeguards were not present in Hamblen's case because once he fired his lawyer, there was no one to search his background for mitigating evidence and no one to argue mitigation to the court. Since those interests were not protected in the court below, we are urged to remand the case for a new sentencing hearing and direct the trial judge to appoint a lawyer to represent not Hamblen but the state's – or, more precisely society's – interests in ensuring that the death penalty is imposed properly. Such counsel, similar to a guardian ad

[13] Undersigned counsel is aware of at least one pending appeal in which the capital defendant's counsel has argued that Hamblen should be receded from. David Kelsey Sparre v. State, SC12-891, initial brief, p.35-50; reply brief, p.6-12; orally argued on December 3, 2012

> litem, would investigate the case and Hamblen's background in hopes of finding mitigating factors with which to persuade the court to spare his life. By allowing Hamblen to waive counsel for the penalty phase, the public defender argues that the trial judge committed reversible error.

527 So.2d at 802.

Note (1) that, as in the instant case, the undersigned did not seek an outcome contrary to the defendant's own objectives until ordered to do so by this Court; and (2) that his proposed solution was not that the defendant could not waive counsel and/or present his own position in favor of a death sentence, but rather that if he did so, then the trial court should appoint special counsel (not purporting to "represent" the unwilling defendant) to investigate mitigation and present the case against the death penalty. In this way, an adversary penalty proceeding would be assured, without violating the defendant's rights under Faretta.

By a 5-2 vote (with Justices Ehrlich and Barkett dissenting), the Court declined to adopt the undersigned's proposal:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have the right to control their own destinies.

Hamblen, at 804.

[Note that the Court has since made it clear that the appointment of special mitigation counsel against the defendant's wishes does not necessarily violate the dictates of Faretta. Barnes v. State, 29 So.3d at 1022-26].

The Court summarized its holding in Hamblen as follows:

> We hold there was no error in not appointing counsel against Hamblen's wishes to seek out and present mitigating evidence and to argue against the death penalty. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

527 So.2d at 804.

[In the instant case, in contrast, Judge Greider failed to protect society's interests on her own; see Parts B, (no Koon inquiry), E (premature sentencing decision), F (great weight to Robertson's death wish)].

This Court has repeatedly recognized the importance of an adversary appeal, in which the propriety of the death sentence is challenged by counsel, in all capital cases regardless of the defendant's wishes, and regardless of people like the undersigned who keep moving to withdraw. Hamblen; Robertson, 2014 WL 3360330; Klokoc v. State, 589 So.2d 219,221-22(Fla.1991); Hill v. State, 656 So.2d 1271(Fla.1995); Ocha v. State, 826 So.2d 956,964-65(Fla.2002). To require an adversary appeal without requiring an adversary penalty proceeding in the trial court is like trying to build a skyscraper starting with the upper floors. The investigation and presentation of mitigating circumstances, along with the aggravating circumstances presented by the state, is the foundation of a capital case, without which meaningful proportionality review cannot be conducted and - - even more importantly - - the reliability of the sentencing decision, by the jury and trial judge (or by the judge alone if a jury is waived), cannot be assured.

In Barnes v. State, 29 So.3d at 1022, the trial judge ap-

pointed special counsel, over Barnes' objection, to investigate and present mitigation. On appeal this Court, rejecting Barnes' complaint that the appointment of special counsel violated his Faretta right to self-representation, observed:

> Appointment of mitigation counsel in this case, where Barnes essentially refused to provide any mitigation evidence, was intended to provide such a safeguard and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty. This was proper in order to ensure that the severe and irrevocable penalty of death, if imposed, would be justified and not be imposed in an arbitrary or capricious manner.
>
> The Supreme Court in Eddings v. Oklahoma, 455 U.S. 104,102 S.ct. 869,71 L.Ed.2d 1(1982), reiterated the requirement of individualized sentencing in capital cases that is required by the Eighth and Fourteenth Amendments to the United States Constitution. See id. at 105,102 S.Ct. 869. "The use of mitigation evidence is a product of the requirement of individualized sentencing." Kansas v. Marsh, 548 U.S. 163,174, 126 S.Ct. 2516, 165 L.Ed.2d 429(2006). Thus, in order for a trial court to carry out its duty to give each capital defendant the individualized sentencing that the Constitution requires, the court may appropriately require presentation of mitigation where a pro se defendant such as Barnes essentially refuses to present any evidence of mitigation. Presentation of mitigation in such a case also allows this Court to carry out its obligation to determine if the death sentence is proportionate.

29 So.3d at 1025.

In his opinion concurring in part and dissenting in part in Farr v. State, 656 So.2d 448,451-53(Fla.1995), Justice Kogan (joined by Justice Anstead), noting that "[o]ur piecemeal approach to cases like Farr's has not adequately addressed all the problems at hand", wrote:

> A time is coming when this Court must comprehensively address the problem of defendants who seek the death penalty, whose numbers are growing. We have reached the stage at which our holdings are not entire-

> ly consistent with each other or with our own rules of court. Case-by-case adjudication of a larger problem certainly has its place, but not when the result is a confounding of the overall law: a point we are rapidly reaching.

Now, 26 years after Hamblen and 19 years after Farr, we are still getting cases as confounded as James Robertson's, where the defense attorney in the trial court not only "acquiesced" to Robertson's death wish but pursued the death penalty even more vociferously than the prosecutors did; where defense counsel, latching onto his client's instructions, did no mitigation investigation; where there was a complete failure on the part of both counsel and the trial judge to comply with the requirements of Koon v. Dugger; where the PSI was neither comprehensive nor in compliance with the rule that the DOC should not recommend a sentence; where the judge apparently predetermined that she would sentence Robertson to death, and prepared the written order doing so, before the combined plea and sentencing hearing took place; and where Robertson's "wishes and intent" to be executed was improperly accorded great weight in the sentencing decision. Plainly, this case illustrates that neither Hamblen, nor the efforts to fine tune its holding made in such cases as Koon; Muhammad, and Barnes, are working.

Under current Florida caselaw, when a capital defendant waives mitigation, the trial judge has the discretion to appoint special mitigation counsel. See Klokoc, 589 So.2d at 220; Muhammad, 782 So.2d at 364; Barnes, 29 So.3d at 1022-26; Grim v. State, 841 So.2d 455,462 n.5(Fla.2003); Grim v. State, 971 So.2d 85, 102(Fla.2007); Russ v. State, 73 So.3d 178,189(Fla.2011). The

judge also has the discretion to utilize standby counsel for this purpose [Muhammad, 782 So.2d at 364 and n.15], or to call persons with mitigating evidence as the court's own witnesses [Muhammad, at 364]. Such a procedure does not violate the defendant's right under Faretta to self-representation [see Barnes] because "[a]ny counsel performing this function would be acting solely as an officer of the court." Muhammad, at 364, n.15. "Because the appointment of special counsel is solely at the discretion of the trial court, and because special counsel solely represents the public interest, no attorney-client relationship is established between special counsel and the defendant. Therefore, a defendant has no basis for claiming that special counsel's presentation of mitigation evidence was ineffective." Grim, 971 So.2d at 102 (citing Muhammad). See also Barnes, 29 So.3d at 1023 ("...[W]e find the trial court acted properly in this regard in appointing independent court counsel, who did not represent Barnes but was directed to assist the court by investigating and presenting mitigation" (emphasis supplied).

The state may argue that the appointment of special counsel is solely at the discretion of the trial judge [see Grim, 971 So.2d at 102], but that doesn't mean that the judge's discretion is unbridled or that it can never be abused. See Ellard v. Godwin, 77 So.2d 617,619(Fla.1955); Carolina Portland Cement Co. v. Baumgartner, 99 Fla. 987,1003,128 So.241,247(1930); Matire v. State, 232 So.2d 209,210-11(Fla.4th DCA 1970); Reed v. State, 421 So.2d 754,755(Fla.4th DCA 1982); Freeman v. State, 65 So.3d 553,556(Fla.2d DCA 2011). "[Judicial discretion] is not a naked

right to choose between alternatives. There must be a sound and logically valid reason for the choice made." State ex rel Mitchell v. Walker, 294 So.2d 124,126(Fla. 2d DCA 1974); Parce v. Byrd, 533 So.2d 812,814(Fla. 5th DCA 1988); Ferrer v. State, 718 So.2d 822,825(Fla. 1998). "Whether or not discretion has been abused is a question to be evaluated under the totality of the circumstances. Moreover the exercise of discretion must be measured against articulable standards in order to arrive at a principled reason for the decision." Sekot Laboratories v. Gleason, 585 So.2d 286,289(Fla. 3d DCA 1991).

While this Court has recognized for years that a capital trial judge has the discretionary authority to appoint special mitigation counsel [Muhammad, Grim, Barnes], and has commented favorably on the use of special counsel as a safeguard to ensure the constitutional reliability of the sentencing process [see Barnes, 29 So.3d at 1025-26], and has even in one case reversed a death sentence on proportionality grounds based in large part on mitigating evidence which was discovered and presented by special counsel [Klokoc], the Court has not as yet articulated any specific guidelines as to when the judge should exercise his or her discretionary authority. This case (in the event that this Court chooses not to simply overrule Hamblen) provides a perfect opportunity to establish these needed guidelines. For example, the Court might indicate that when the defendant is merely waiving the presentation of some specific mitigating evidence but is not actively seeking the death penalty [see, e.g., Mora v. State, 814 So.2d 322,333(Fla.2002); Boyd v. State, 910 So.2d 167,189-90

(Fla.2005); Eaglin v. State, 19 So.3d 935,945-46(Fla.2009); McCray v. State, 71 So.3d 848,879-80(Fla.2011)] appointment of special mitigation counsel is likely to be unnecessary, while - - at the opposite end of the spectrum - - when the defendant and his attorney are doing everything they can to obtain a death sentence and to "avoid finding facts" which might interfere with that goal, the appointment of special counsel may be necessary to assure the reliability of the sentencer's weighing process.

Of course, no set of guidelines can anticipate every conceivable scenario which may arise, and that is why, in the wide high middle of the "waiver of mitigation" bell curve, there may well be situations where a trial court could decide to appoint or not to appoint special counsel and (unless this Court overrules Hamblen) neither decision would be an abuse of discretion. But Robertson's case does not fall into that category. More so than any of the reported cases after Hamblen, Robertson's death wish became the driving force which infected nearly every procedural aspect of the sentencing process. In addition, substantively, Robertson's death wish was improperly accorded great weight in the trial court's decision to impose the death penalty. Whether this Court chooses to overrule Hamblen; or hold that the judge abused her discretion by failing to appoint special mitigation counsel under the extreme circumstances of this case; or find that defense counsel DeSisto's actions (latching onto Robertson's death wish) in actively pursuing a death sentence and failing to investigate mitigation were ethically unacceptable; or reverse the death sentence based on the improper PSI death recommendation, or the trial court's and

defense counsel's failure to comply with Koon, or the trial court's precommitment to impose the death penalty as shown by her premature written order, or the great weight given to the non-aggravator of "the defendant's wishes and intent"; or any combination of these reasons; Robertson's death sentence cannot be upheld.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, Robertson's death sentence cannot be upheld.

CERTIFICATE OF SERVICE

I certify that a copy has been emailed to Assistant Attorney General Stephen Ake, at Stephen.ake@myfloridalegal.com, and capapp@myfloridalegal.com, on this 22 day of August, 2014.

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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