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IN THE SUPREME COURT OF FLORIDA

WILLIAM ROGER DAVIS, III,

Appellant,

vs.

CASE NO. SC13-6

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT,
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR SEMINOLE COUNTY

# APPELLANT'S REPLY BRIEF

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**Point one.** The State on this point argues only that the record does not support Appellant's position; it asserts that the record shows the court did not surprise counsel at the penalty-phase charge conference by suggesting a new aggravating factor. Appellant stands by his reading of the charge conference, and maintains his position that the concerns articulated by the concurring Justices in Robards v. State, 112 So. 3rd 1256 (Fla. 2013), warrant relief here.

**Point two.** The State relies on the fact that the sentencing order discusses the mental illness-related mitigating evidence at some length. The portion of the order devoted to that mitigation may be long, but it consists chiefly of summaries of testimony, followed by bare and conclusory analysis. The judge discounted the evidence of mental illness based on his views that that illness neither contributed to nor justified the murder. The court's rejection of the statutory mitigator of "under the influence of severe mental or emotional disturbance" was not supported by competent, substantial evidence, and its weighing of mitigation in the sentencing order does not reflect the "reasoned judgment" this court requires. This court should reverse for the trial court to reweigh the mitigating evidence and reconsider its sentence.

**Point three.** The record does not support the finding that the victim was killed predominantly to prevent discovery of the rape and prosecution for it. The "avoid arrest" aggravating factor should be struck from the sentencing order.

**Point four.** The record does not support the court's finding that the killing was the result of careful planning. The "cold, calculated, and premeditated" aggravating factor should be struck from the sentencing order.

**Point five.** The State acknowledges *pro forma* that the number of aggravating and mitigating factors does not dispose of the proportionality question. However, it dismisses the cases Appellant relies on because they involve fewer aggravating factors than this case. For the death penalty to be held proportionate a case must be among the least mitigated, as well as one of the most aggravated, to come before this court. The jury in this case asked the court what the practical effect of a life recommendation would be, and returned a 7-5 death recommendation. This court should hold that a death sentence is a disproportionate outcome, given that the State and defense experts agreed that Appellant has a significant history of mental illness and given that testimony tied that history to the crime.

**Point six.** The State argues that the issue raised on this point was not preserved for appeal, because defense counsel did not renew his pretrial objection at the penalty-phase charge conference. Doing so would have been a futile act,

since after a pretrial hearing the trial court rejected the defense argument. On the merits, Appellant relies on the argument made in his initial brief on this point.

**Point seven.** The appellant will rely on his initial brief as to this point.

## ARGUMENT

### POINT ONE

IN REPLY: THE TRIAL JUDGE FAILED TO REMAIN NEUTRAL DURING THE PENALTY PHASE. THE DEFENSE WAS PREJUDICED; THE ERROR WAS FUNDAMENTAL. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, PROTECTED BY THE FEDERAL AND FLORIDA CONSTITUTIONS, WAS ADVERSELY AFFECTED.

**Argument.** The State on this point argues only that the record does not support Appellant's position; it asserts that the record instead affirmatively shows the court did not surprise counsel at the penalty-phase charge conference by suggesting a new aggravating factor. Appellant stands by his reading of the charge conference, and in that regard points out the following:

- The supplemental record filed by the State shows that the prosecutor did in fact file two Notices of Aggravating Circumstances before the guilt phase; neither included any mention of the "avoid arrest" aggravator. (SR 1-4)
- When the judge first mentioned the "avoid arrest" factor at the penalty-phase charge conference, he said "I assume you're going to argue that." (XVIII 2530)
- When counsel for the State asked at that juncture where the judge was

reading, he responded "same page, number four. It says 'the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.' I know that always comes in when there's a murder." (XVIII 2531)

- Counsel for the State then expressed confusion, saying "I think I must have a different copy because-" Defense counsel responded "four wasn't in there on the previous copy I had and now it is." (XVIII 2531)
- The judge, when he announced he could "streamline" things for the State, explained that "the jury could determine circumstantially that the actions of Mr. Davis were in the nature of one of avoidance of arrest by the driving around...I think you have the ability to argue that.... Because of the nature of the [other charges] alone...it could be argued that he committed the murder to avoid arrest." (XVIII 2533-34)

The State now argues that at the charge conference, defense counsel "was clearly not surprised...and immediately made an appropriate argument against submitting [the avoid arrest] aggravator to the jury. Trial counsel's argument was the same as the one appellate counsel raises in Claim III of the Initial Brief."

(Answer brief at 65 and n.34) At the charge conference, defense counsel argued only that avoiding arrest had not been shown to be the dominant motive for the murder. (XVIII 2543) The record shows that both Mr. Caudill for the defense, and Mr. Whitaker for the State, were experienced in trying capital cases; the fact that defense counsel was able to articulate a single appropriate objection on the fly does not establish that he was not surprised. In this appeal, in contrast, Appellant argues not only that avoiding arrest must be shown to be the dominant motive for the slaying, but also that

- rape and murder often stem from the same hostile and aggressive impulses, rather than from a calculated effort to avoid arrest;
- the burden lies on the State to prove the defendant's state of mind, and speculation is insufficient;
- the defendant's slow drive-by at the car lot at 5:30 p.m. was in fact not calculated to avoid arrest;
- the defendant's evident intention of switching the blanket-wrapped body from one car to the other in a bar's parking lot, at happy hour, was in fact not calculated to avoid arrest;
- the murder scene was in no way sanitized so as to baffle the authorities; and

- ♦ the State's argument in support of the "avoid arrest" aggravator was logically inconsistent with its argument in support of the "cold, calculated, and premeditated" aggravator.

(Initial brief at 53-57)

Appellant maintains his position that the concerns articulated by the concurring Justices in Robards v. State, 112 So. 3rd 1256 (Fla. 2013), warrant relief here.

## POINT TWO

IN REPLY: THE TRIAL COURT REJECTED THE STATUTORY MITIGATING FACTOR OF EXTREME MENTAL DISTURBANCE WITHOUT THE SUPPORT OF COMPETENT, SUBSTANTIAL EVIDENCE. THE COURT ALSO RELIED ON NONSTATUTORY AGGRAVATING FACTORS TO SUPPORT ITS RULING REJECTING THAT FACTOR. APPELLANT'S RIGHT TO RELIABLE SENTENCING PROCEEDINGS, GUARANTEED BY THE FEDERAL EIGHTH AMENDMENT, WAS ADVERSELY AFFECTED.

The State asserts that the sentencing order in this case is completely distinguishable from the order disapproved by this court in Oyola v. State, 99 So. 3rd 431 (Fla. 2012), in that it devotes considerable space to discussion of the mental health-related mitigating evidence. (Answer brief at 70) Appellant's position is that the portion of the order devoted to that mitigation may be long, but that it consists primarily of summaries of testimony, followed by bare and conclusory analysis. Paragraphs (1)(a) through (c) and (1)(g)of the order summarize the expert testimony. (IV 648-49, 651) Paragraph (1)(d) summarizes the lay witnesses' penalty phase testimony. (IV 649-50) Paragraphs (1)(e) and (f) set out the judge's conclusions about what went on in the defendant's mind, during his history and in the days before October 29. (IV 650-51) Paragraph (1)(h), reproduced here in full,

analyzes the legal effect of the foregoing as follows:

> The Court is reasonably convinced that the facts above establish that the Defendant suffers from a mental illness, bi-polar and anti-social personality traits, that when he is medicated, can be controlled, but that those mental illnesses and anti-social traits were only contributing factor's to his choices, and not the cause of his actions or that at the time of the murder his mental illness was so extreme that it was a major factor in an inability to control his behavior. His statement to the detective the night of the murder are the most telling of his calculating mind as well as his callous behaviors.
>
> Therefore the Court is reasonably convinced that this [statutory] mitigating circumstance has not been proven but the Court will give some weight to the components of his mental illness as a factor in mitigation of this offense, St. v. Ault, 53 So. 3rd 175 (Fla. 2010).

(IV 651) Paragraph (2)(a), regarding non-statutory mitigation, recounts the penalty-phase testimony about Appellant's childhood, followed by the conclusion "[t]he Court is reasonably convinced that this mitigating circumstance that the Defendant suffers from long term chronic mental problems that began in early childhood has been proven and should be given some weight." (IV 651-52) Paragraph (2)(b) lists Appellant's diagnoses, then states

> All of these illnesses and conditions lend to some of the explanations for his acting out at a young age and in high school as well as when he became an adult. They do not in any way justify his intentional acts against this

> victim or against past victims but may seek to help explain that behavior. He has a history of suicide attempts both in the military and while incarcerated. There was no real long term treatment for him either in the military or in prison but he did receive some of the diagnosis while there and was medicated to help the conditions. He was instructed and was supposed to continue his medications and seek counseling but he chose not to and was off his medications, sometimes self-medicating through the use of illegal substances, for many months prior to the murder.
>
> The court is reasonably convinced that this mitigating circumstance of the Defendant's ability to be properly treated with medication in an attempt to control his behavior has been proven and should be given some weight.

(IV 652-53)

The court's analysis thus consists of its conclusions that

- the defendant responds to medication;
- mental illness was not even a factor that contributed to the killing;
- mental illness does not justify the killing; and
- the defendant resists taking medication.

The State argues that Miller v. State, 373 So. 2d 882 (Fla. 1979), Walker v. State, 707 So. 2d 300 (Fla. 1997), and Perez v. State, 919 So. 2d 347 (Fla. 2005), *cert. den.*, 547 U.S. 1182 (2006), are altogether inapplicable here, because the defendant's expected behavior if he goes off his medications "is clearly a fact that

exists. Recognition of it does not somehow transform it into a 'nonstatutory aggravator.'" (Answer brief at 71) This court and the federal courts agree that the sentencer in a capital case may not "apply as aggravating circumstances conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." Moore v. Balkcom, 716 F.2d 1511, 1522 (11th Cir. 1983), *cert. den.*, 465 U.S. 1084 (1984), *citing* Zant v. Stephens, 462 U.S. 862 (1983); accord Miller, 373 So. 2d 882, 885 and n.4. The Miller/Walker/Perez line of cases is necessarily implicated here, because the judge ruled that statutory mitigation was absent based on his view that the expert testimony offered in mitigation instead militated in favor of the death penalty. In Miller, such a conclusion tipped the scales in favor of a death sentence; this court reversed. 373 So. 2d at 885-86. In Perez, such a conclusion led to giving little weight to the nonstatutory mitigator of an abusive upbringing; this court distinguished Miller and found no abuse of discretion. Here, the court's view of the mental-health evidence led to rejection of the statutory mitigator "under the influence of extreme mental disturbance." Section 921.141(6)(b), Fla. Stat. "Severe mental disturbance is a mitigating factor of the most weighty order." Rose v. State, 675 So. 2d 567, 573 (Fla. 1996). As noted in the initial brief, the trial court ultimately gave the defendant's history of mental illness less weight than it gave to his exhibiting

appropriate courtroom demeanor while medicated. Miller, rather than Perez, should control here.

The trial court may reject a mitigator if competent, substantial evidence of record supports its decision to do so. Oyola, supra, 99 So. 3rd at 445. Here the judge discounted the evidence of mental illness offered in mitigation based on his views that Appellant's mental-health problems neither contributed to nor justified the murder. None of the expert witnesses testified that mental illness was not even a contributing cause to the murder, although one of them did opine that it was not the sole cause for it. While one of the doctors testified that Appellant's diagnoses did not justify the murder, that opinion was outside the scope of his expertise. The court's rejection of the statutory mitigator was thus not supported by competent, substantial evidence, and the sentencing order does not reflect the "reasoned judgment" this court requires. See Oyola at 446. Reversal for the trial court to reweigh the mitigating evidence, and to reconsider its sentence, is in order.

## POINT THREE

IN REPLY: THE "AVOID ARREST" AGGRAVATING FACTOR WAS NOT PROVED BEYOND A REASONABLE DOUBT BY THE EVIDENCE; THE ORDER FINDING ITS PRESENCE WAS BASED ON SPECULATION AND FAILED TO MEET THE REQUIREMENTS OF THE FEDERAL CONSTITUTION OR THIS COURT'S CASELAW.

The State recounts the judge's findings on this point, which were as follows:

- Before the murder, the defendant parked down the road from the car lot.
- After the murder, the defendant wrapped the victim's body to transport it.
- The victim could identify the defendant.
- The victim neither resisted nor otherwise provoked the defendant.
- The defendant evidently intended to transfer the victim from one car to the other in the dark.
- The defendant was on probation.

(IV 642-44) The first two findings are logically outweighed by the fact that the defendant, at 5:30 in the afternoon, drove by the car lot where he had earlier abducted the victim so slowly as to catch the car dealer's eye - the very antithesis of an effort to avoid arrest. Sunset came at 6:43 in Orlando that evening,[1] casting

[1] www.timeanddate.com/worldclock/astronomy.html. See X1127,1138, where an officer testified that by the time "everybody" involved in the investigation arrived, the sun was setting.

doubt on the viability of the inference that the defendant intended to use the cover of darkness. Competent, substantial evidence thus supports only the circumstances that the defendant was on probation, the victim could identify him, and the victim did not provoke her own death. That showing is not as strong as the showing that was made in the cases the State relies on.

In Reynolds v. State, 934 So. 2d 1128 (Fla. 2006), *cert. den.*, 549 U.S. 1122 (2007), cited by the State, the defendant told an acquaintance after the murder "with my record, I can't leave any witnesses." 934 So. 2d at 1156-58. Reynolds is patently distinguishable from this case, where the State relied on circumstantial evidence to establish the "avoid arrest" aggravating factor. In Jones v. State, 748 So. 2d 1012 (Fla. 1999), *cert. den.*, 530 U.S. 1232 (2000), Cave v. State, 727 So. 2d 227 (Fla. 1998), *cert. den.,* 528 U.S. 841 (1999), Preston v. State, 607 So. 2d 404 (Fla. 1992), *cert. den.,* 507 U.S. 999 (1993), and Routly v. State, 440 So. 2d 1257 (Fla. 1983), *cert. den.,* 468 U.S. 1220 (1984), also relied on by the State, the victim was transported to a remote location and killed there after a serious violent crime was complete; this court affirmed rulings that the killings presumably therefore were committed to avoid the consequences of those completed crimes. Jones, 748 So. 2d at 1027; Cave, 727 So. 2d at 228-30; Preston, 607 So. 2d at 409; Routly, 440 So. 2d at 1260, 1262-63. Here the asportation of the victim preceded

the rape; Miss Malave, unlike the victims in the cited cases, was not taken to an unobserved location after the need to eliminate a witness arose. Similarly, in Willacy v. State, 696 So. 2d 693 (Fla.), *cert. den.*, 522 U.S. 970 (1997), also cited by the State, this court held that the proof showed there would have been little need to kill the victim, except to avoid prosecution, after an underlying burglary was complete. Here, in contrast, the killing immediately followed a rape, and the inference as readily arises that the killing was due to the violent emotions that accompany rape, as this court held in Doyle v. State, 460 So. 2d 353 (Fla. 1984).

As to Doyle's applicability, the State relies on Adams v. Wainwright, 764 F. 2d 1356 (11th Cir. 1985), *cert. den.*, 474 U.S. 1073 (1986). The Eleventh Circuit Court in Adams declined to apply this court's then-recent Doyle precedent, noting that "[t]he type of hostile-aggressive impulses associated with rape are not as readily implicated in a kidnapping case." 764 F. 2d at 1366. The federal court's holding was that the facts of Adams's case were distinguishable from those of Doyle's case, in that Adams committed "deliberate acts to avoid detection." Id. The opinion issued on direct appeal in Adams shows that he "disposed of the body in a desolate area" and "concealed his crime effectively for a [two-month] period of time." Adams v. State, 412 So. 2d 850, 856 (Fla.), *cert. den*., 459 U.S. 882 (1982). Those facts are distinctly absent in this case, where the defendant drove

around with the body for hours then returned - so slowly as to attract attention - to the very place where he had abducted the victim.

The State objects to Appellant's argument on this point to the extent it relies on a theory that the "avoid arrest" aggravating factor *cannot* coexist with other aggravators. (Answer brief at 75-76 and n.37) The Appellant does not take that position, but instead argues that *in this case* the reasoning offered in support of the "avoid arrest" aggravator is inconsistent with the reasoning offered in support of the "cold, calculating, and premeditated" factor.

The record does not support the finding that Fabiana Malave was killed predominantly to protect the defendant from discovery of the rape and prosecution therefor. The "avoid arrest" aggravating factor should therefore be struck from the sentencing order.

## POINT FOUR

IN REPLY: THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING FACTOR WAS NOT PROVED BEYOND A REASONABLE DOUBT; THE COURT'S ORDER FINDING ITS PRESENCE WAS BASED ON SPECULATION AND FAILED TO MEET THE REQUIREMENTS OF THE FEDERAL CONSTITUTION OR THIS COURT'S CASELAW.

The State recounts the court's findings as to the "cold, calculated and premeditated" aggravating factor, which were as follows:

- The defendant parked down the street and took a knife to the car lot.
- The defendant transferred the victim to his car so as not to attract attention by driving an unfamiliar car in his own neighborhood.
- The defendant threatened the victim with death as soon as the abduction began.
- The defendant had time to plan a murder *en route* to his home.
- The defendant's account of the incident was emotionless.
- The defendant wrapped the body to transport it.
- Sunset was imminent when he returned to the scene, which would have aided him in avoiding detection.

(IV 645-48) The court concluded from those findings that the defendant had

planned the murder for days. (IV 648)

Again, the first three findings are outweighed by the fact the defendant drove virtually into the arms of investigating officers after he returned to the scene of the crime. Again, also, sunset was not in fact imminent. As to the brusqueness of Appellant's account of the incident, Appellant concedes that the *cold* aspect of this aggravating factor is present, but not that *calculation and heightened premeditation* were shown. As to the wrapping of the body, this court holds that measures taken after a murder is complete do not tend to show the killing was committed pursuant to a calculated plan. Power v. State, 605 So. 2d 856, 864 (Fla. 1992), *cert. den*, 507 U.S. 1037 (1993).

The State relies on Conde v. State, 860 So. 2d 930 (Fla. 2003), *cert. den.,* 541 U.S. 977 (2004), Evans v. State, 800 So. 2d 182 (Fla. 2001), and Sexton v. State, 775 So. 2d 923 (Fla. 2000) for the principle that mental illness can coexist with heightened premeditation. Those cases are distinguishable here: Conde claimed he had lost control when he killed a prostitute, but the trial court and this court concluded the claim was not supported by the record, which showed Conde had committed precisely the same crime on five prior victims. 860 So. 2d at 937, 953-54. Evans crafted a silencer from a shampoo bottle and killed his victim execution-style, putting five bullets in the victim's head. 800 So. 2d at 186. No

mental health-related mitigating evidence was put on, at the defendant's request. Id. The trial court concluded Evans suffered from "some sort of mental impairment," but ruled that the evidence of calculation outweighed that fact, a ruling this court affirmed. Id. at 196, 193. In Sexton v. State, the victim discovered the defendant had committed a series of appalling crimes on members of his family, and the defendant told witnesses the victim "had to be disposed of" because he knew too much. 775 So. 2d at 926-28. Sexton directed his mentally challenged son, Willie, to "put [the victim] to sleep" with a garrotte, and Sexton was later heard saying he had had Willie kill the victim. Id. at 927-28. This court held that despite extensive evidence of abnormal brain function on Sexton's part, a cold, calculated and premeditated killing was shown there by "lengthy and careful planning and prearrangement and an execution-style killing." Id. at 935.

The State concludes that this case, like Sexton, involved "a lengthy series of events leading up to the murder." (Answer brief at 81) The record does not support the conclusion. The showing of preparation on the defendant's part consisted of his parking at the Post Time Lounge and taking a knife to the car lot, and after the abduction began the defendant's undisputed and highly inculpatory account of events placed the rape and murder about 25 minutes after the cross-town drive to his house. Conde and Sexton are notably distinguishable as to the time factor

involved in planning the victim's death. The facts of Evans (five bullets to the head with a silenced weapon) also unmistakably reflect calculation as well as coldness. This case, in contrast, like Power v. State, supra, involved a killing committed immediately after a rape; this court held in Power that the evidence there established, at best, a plan to rape rather than kill the victim. 605 So. 2d at 864. The State's showing in this case, similarly, established a plan to rape but not necessarily to kill. The cold, calculated, and premeditated aggravating factor should be struck from the sentencing order.

## POINT FIVE

### IN REPLY: THE DEATH PENALTY IS NOT PROPORTIONATE IN THIS CASE.

The State acknowledges *pro forma* that the number of aggravating and mitigating factors is not dispositive of the proportionality question. (Answer brief at 82) It proceeds to dismiss the cases Appellant relies on because they involve fewer aggravating factors than this case. (Answer brief at 84) For the death penalty to be held proportionate a case must be among the least mitigated, as well as one of the most aggravated, to come before this court. Crook v. State, 908 So. 2d 350, 357 (Fla. 2005). Absent from the State's brief is any acknowledgement of the severity of the defendant's mental illness. Further absent is any acknowledgement of the evidence that tied Appellant's mental illness to the crime.

Dr. Danziger testified in the penalty phase that in October, 2009, the defendant was "not properly stabilized" in that he was not medicated. (XVII 2420) The defendant testified that he would not have committed the crimes had he been medicated, and the court in its sentencing order reckoned him to be an honest witness. (XVIII 2495; IV 654-55) Dr. Danziger also testified that in October, 2009 the defendant was "in a very agitated and depressed state," which manifested itself in his "essentially allow[ing] himself to be caught." (XVII 2420) Dr. Riebsame,

the expert the State called in the penalty phase, admitted that that same behavior "may" support a finding of extreme emotional disturbance (XVIII 2516), although his overall position was that he would not find that mitigator present without the presence of either psychotic symptoms or "very extreme emotionally disturbed symptoms ...so that the person's behavior is obviously erratic, irrational, maybe disorganized." (XVIII 2511-12) That the State's expert uses a strict criterion for finding the presence of statutory mitigators does not affect the fact that both parties' penalty-phase experts testified that they found the defendant's behavior in attracting attention to himself at the scene of the crime indicated mental or emotional disturbance.

The cases relied on by the State are distinguishable. In Buzia v. State, 926 So. 2d 1203 (Fla.), *cert. den*., 549 U.S. 874 (2006), no mental-health mitigation was admitted except for some testimony about the defendant's cocaine and alcohol use. 926 So. 2d 1207. In Miller v. State, 42 So. 3rd 204 (Fla. 2010), *cert. den.*, 131 S. Ct. 935 (2011), the only mental-health diagnosis the defense proved was antisocial personality disorder; the death recommendation in that case was 11-1, and the defense did not argue in the appeal that the sentence was disproportionate. 42 So. 3rd at 212, 229) In Turner v. State, 37 So. 3rd 212 (Fla.), *cert. den*., 131 S. Ct. 426 (2010), the defense relied on the defendant's 79 IQ and the presence of

cognitive deficits due to early drug use, but proved neither that Turner had brain damage nor that he had received any other diagnosis. 37 So. 3rd at 219, 224. In Zommer v. State, 31 So. 3rd 733 (Fla.), *cert. den*., 131 S. Ct. 192 (2010) and Kocaker v. State, 119 So. 3rd 1214 (Fla.), *cert. den.,* 133 S. Ct. 2743 (2013), the parties' experts disagreed; in both cases State experts testified that the defense experts' respective diagnoses of bipolar disorder and schizophrenia were invalid, and in both cases this court held that the trial court's rejection of statutory mitigating factors, based on that testimony, was supported by competent, substantial evidence. 31 So. 3rd at 748-50; 119 So. 3rd at 1229-30, 1232.

In this case, in contrast, Dr. Tressler conceded that the defendant has a well-documented history of bipolar disorder, and Dr. Riebsame conceded that he was likely experiencing symptoms of bipolar disorder at the time of the offenses. (XIV 1862, 1939-40) Appellant's history of exhibiting psychotic symptoms along with abrupt mood swings was likewise undisputed. (XVII 2404-08; XVIII 2503) Here, as in Crook v. State, supra, the jury asked the court what the practical effect of a life recommendation would be, and returned a 7-5 death recommendation. See Crook, 908 So. 2d at 352. This court should hold that death is a disproportionate outcome in this case, given the experts' agreement on the significant mental illness-related mitigation.

## POINT SIX

IN REPLY: THE STANDARD JURY INSTRUCTION DEFINING THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING FACTOR LACKS OBJECTIVE STANDARDS. APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND THE GUARANTEE OF RELIABLE SENTENCING PROCEEDINGS, PROTECTED BY THE FEDERAL AND FLORIDA CONSTITUTIONS, WERE ADVERSELY AFFECTED ON THE FACTS OF THIS CASE.

The State argues that the issue raised on this point was not preserved for appeal, because defense counsel did not renew his pretrial objection at the penalty-phase charge conference. (Answer brief at 87; XVIII 2545) Doing so would have been a futile act, since after a pretrial hearing the trial court rejected the defense argument. (XX 2785-87; I 155) The courts do not require counsel to engage in futile acts to preserve issues for appeal. E.g., Howard v. State, 616 So. 2d 484, 485 (Fla. 1st DCA 1993).

On the merits, Appellant relies on the argument made in his initial brief on this point.

## POINT SEVEN

IN REPLY: THE TRIAL COURT ERRED IN DENYING RELIEF BASED ON RING v. ARIZONA.

The appellant will rely on his initial brief as to this point.

## CONCLUSION

Appellant has shown that this court should reverse the sentencing order and remand for a new penalty phase, based on the arguments made above on points six and seven.

If that relief is denied, Appellant has shown this court should reduce his death sentence to a life sentence, as a result of striking aggravating factors or proportionality analysis.

If that relief is denied, Appellant has shown that this court should reverse the sentencing order appealed from and remand for a new judge to reweigh the mitigating and aggravating factors.

If that relief is denied, Appellant has shown that this court should reverse

the sentencing order and remand for Judge Galluzzo to reweigh the mitigating and aggravating factors.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply brief has been electronically delivered to the Attorney General's Office, capapp@myfloridalegal.com and Assistant Attorney General Kenneth S. Nunnelley, at ken.nunnelley@myfloridalegal.com, this 16th day of October, 2013.

Nancy Ryan

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

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