IN THE SUPREME COURT OF FLORIDA

AMOS EARL ROBINSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 65,506
	)	
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

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

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

ISSUE I

The Appellee will argue that the confession was properly admitted since this issue presents a question of order of proof and nothing more. Many record pages are cited to show that there was independent evidence of the corpus delicti.

ISSUE II

The Appellee will argue that there has been inadequate preservation of this issue due to either no objection, inadequate objection or argument presented on appeal that does not parallel the argument presented below. The Appellee will also argue that the record does not show multiple copies of the transcript in question going into the jury room on deliberation. The Appellee will also argue that the tape recording itself was entered into evidence and heard by the jury and was clear. Further, that the transcript was, according to defense counsel, an accurate reproduction of the tape recording itself and no prejudice has been shown.

ISSUE III

The Appellee will argue, by referring to the record, that Juror Saulino and Juror Fiero held the belief that would

prevent or substantially impair the performance of their duties as jurors in accordance with the instructions and oath. In support of this, the State will rely on case authority representing the most recent voice of the United States Supreme Court.

ISSUE IV

Under this issue, there are numerous subparts dealing with the propriety of the aggravating circumstances that were considered and the mitigating circumstances that were considered in the balance. The Appellee will cite various portions of the record that conclusively show that the crime was cold, calculated and premeditated; heinous, atrocious or cruel; that circumstantial evidence as well as the defendant's own words show that it was committed to avoid arrest. The Appellant's claims that various mitigating circumstances should have outweighed the aggravating is rebutted by the State relying on references to the record to show that Robinson's age and various nonstatutory mitigating circumstances were considered but the judge and jury were not persuaded. This portion of the argument relies on this Court's refusal in the past to reweigh evidence that has been considered by the trier of facts.

ISSUE V

The Appellant under this issue raises arguments that three separate mitigating factors were not read to the jury and

should have been. The Appellee will argue that as to the mitigating factor concerning extreme mental or emotional disturbance, there was no preservation for appeal since no objection was made contemporaneously. The Appellee will argue that as regards the mitigating factor concerning the Appellant's participation being relatively minor, there was no evidence presented and, in fact, the record shows to the contrary that he was a major participant. The Appellee will argue regarding the mitigating factor concerning the Appellant being unable to conform his conduct to the requirements of law, that the record shows no evidence in this regard and any testimony concerning his use of alcohol or drugs on that day show the amounts to have been small, and the defendant, by his own words, was not substantially impaired thereby.

ISSUE VI

The Appellee will argue that the introduction of rebuttal testimony by Dr. Appenfeldt was a question within the discretion of the trial judge and only manifest abuse of that discretion would warrant reversal. The Appellee will further argue that the Appellant opened the door to this testimony and gave it relevancy by calling as their expert Dr. Merin in an attempt to show that Robinson was a follower, thereby implying that Scott was the leader. The Appellee will also argue that while the question of IQ is not conclusive, its consideration as a factor of personality was not not improper and definitely not error that would require reversal.

PREFACE TO THE COURT

The Appellee in Issue III of this brief relies in large part on the recent United States Supreme Court ruling in the case of Wainwright v. Witt, __U.S.__, Case No. 83-1427, decided January 21, 1985. As of the time of filing this brief, the Appellee has not been able to obtain a copy of that written opinion but has discussed the matter at length with the attorney who argued the case on behalf of the State before the Supreme Court (Robert J. Landry, Assistant Attorney General and Bureau Chief - Tampa) and further, has relied on telephonic communication concerning the contents of that opinion.

The Appellee believes that the representation made and relied upon under Issue III of this brief as regards that opinion are accurate and not overstated. Immediately upon receiving a copy of that opinion, it will be submitted to this Honorable Court as would normally be expected had it been available at the time of the filing of this brief.

PRELIMINARY STATEMENT

AMOS EARL ROBINSON will be referred to in this brief as the "Appellant". The STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Appellee will rely on the Statement of the Case and Facts as presented by the Appellant. Where there exists a disagreement between presentation of the facts or the interpretation of those facts, it will be brought to the Court's attention at the appropriate portion of the argument.

ISSUES ON APPEAL

I.

THE TRIAL COURT ERRED IN ADMITTING ROBINSON'S CONFESSION INTO EVIDENCE SINCE THE STATE FAILED TO PROVE THE CORPUS DELICTI FOR A HOMICIDE BY INDEPENDENT EVIDENCE PRIOR TO THE ADMISSION OF THE CONFESSION.

(As Stated by the Appellant).

II.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A TRANSCRIPT OF ROBINSON'S TAPE RECORDED CONFESSION AND IN ALLOWING THE JURORS ACCESS TO THAT TRANSCRIPT DURING THEIR DELIBERATIONS.

(As Stated by the Appellant).

III.

THE TRIAL COURT ERRED IN EXCUSING TWO PROSPECTIVE JURORS FOR CAUSE SIMPLY BECAUSE THEY EXPRESSED OPPOSITION TO THE DEATH PENALTY.

IV.

THE TRIAL COURT ERRED IN SENTENCING AMOS ROBINSON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

(As Stated by the Appellant).

V.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SEVERAL STATUTORY MITIGATING CIRCUMSTANCES.

(As Stated by the Appellant).

VI.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE, AS REBUTTAL EVIDENCE, THE TESTIMONY OF THE PSYCHOLOGIST WHO HAD TESTED AND EXAMINED ROBINSON'S CO-DEFENDANT ABRON SCOTT.

(As Stated by the Appellant).

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ADMITTING ROBINSON'S CONFESSION INTO EVIDENCE SINCE THE STATE FAILED TO PROVE THE CORPUS DELICTI FOR A HOMICIDE BY INDEPENDENT EVIDENCE PRIOR TO THE ADMISSION OF THE CONFESSION.

(As Stated by the Appellant).

In order to narrow the area of disagreement between the Appellant and Appellee, the Appellee will first state that there is no disagreement between the parties as to the cases relied upon by the Appellant in his brief regarding this issue. He cites State v. Allen, 335 So.2d 823 (Fla. 1976), Frazier v. State, 107 So.2d 16 (Fla. 1958), Hodges v. State, 176 So.2d 91 (Fla. 1965) and Hester v. State, 310 So.2d 455 (Fla. 2DCA 1975) for the propositions that a confession is not admissible until the State has proved the corpus delicti by independent evidence; that circumstantial evidence can be sufficient; that proof beyond a reasonable doubt as to prima facie case is not necessary.

The Appellee will specifically call this Honorable Court's attention to the case of Hodges, supra and Hester, supra upon which the Appellant relies. This Honorable Court in Hodges at page 93 deals with the concept of order of proof. The Court at that page states:

> [5] As is indicated in Parrish v. State, 90 Fla. 25, 105 So. 130, evidence may be conditionally admitted

> and though ordinarily evidence of a confession should not be admitted in advance of prima facie proof of the corpus delicti if this occurs and "additional proof of the corpus delicti is afterwards introduced, independent, of the confession, which prima facie established the corpus delicti and would have justified the admission of such confession, the technical error in prematurely admitting the confession will be cured ."

In Hodges, this Honorable Court, at page 93 lists a number of cases where it was held to be error to receive into evidence a confession when the corpus delicti could be established only by the confession. Such is not the case sub judice.

In the case of Hester, supra, at page 457, footnote 2, the Court also recognizes the concept of order of proof and is more akin to the facts sub judice. In Hester, the Court held:

> "Concededly, that which occurred to the little girl in this case could have occurred innocently and without criminal means. This is often the case with circumstantial evidence; but unless such evidence is solely relied upon to support a conviction, all reasonable hypotheses of innocence need not be excluded. In this light, then, considering the tender age of the child and the nature and extent of the injury described by the doctors, we think a reasonable person, calling upon his common experiences, might well have felt tendency to conclude criminal

> causation here. Not necessarily that the injuries were caused by the actual crime ultimately to be proved, but by some crime. That's all that's necessary. The actual crime may be proved later and by other means."

In the case sub judice, the following evidence was introduced, even if, arguendo, in the wrong order:

- The victim left his home in a normal frame of mind, telling no one that he would be gone overnight, etc. (1041 - 1058).
- The victim, who did stay out overnight occasionally, never did so without notifying his family. (1044, 1055).
- The victim did not return home nor did he report to work the next day. (1044, 1050, 1051).
- The victim's body was found in a rural area (off the road) wearing street clothes but no shoes. (R. 1130, 1131).
- The victim's body did not have money or the jewelry that he customarily wore according to the victim's family. (R. 1045, 1058, 1192).
- The Appellant was found to have been in possession of the victim's car. (R.1086).
- The victim's car had fresh blood in the back seat of the same type as the victim. (R. 1052, 1098 - 1115).
- Appellant Robinson told Tillman that he had obtained a car from a "hit" previously. (R. 1088).
- The co-defendants Robinson and Scott not only fled from the automobile but fled to Jacksonville after the crime. (R. 1116 - 1127).

All of the above can be proved independent of the confession of Robinson; hence, the Appellant's present claim that the only proof of an abduction upon which the medical examiner could rely being that of the confession was totally incorrect.

While one could create a hypothesis of innocence from the above facts - for example, the Appellant was robbed and left in a rural area where he subsequently died of natural causes, or the victim was robbed and then committed suicide - these hypotheses need not be applied; first, because it was not a reasonable hypothesis and second, because this is not required when one is not questioning the verdict, but the proof of a prima facie case alone. This is clearly shown in Hester, supra. Furthermore, this Honorable Court, in the case of Stone v. State, 378 So.2d 765 (FSC 1979) at page 771 discusses the three elements that need be shown in establishing the corpus delicti and cites with approval from the case of Frazier v. State, 107 So.2d 16, 26 (Fla. 1958):

> "It is true that before a confession should be received in evidence, there must be some independent proof of the corpus delicti. Parrish v. State, 1925, 90 Fla. 25, 105 So. 130; Keir v. State, 1943, 152 Fla. 389, 11 So.2d 886. There should at least be some additional substantial evidence, either direct or circumstantial. Tucker v. State, 1912, 64 Fla. 518, 59 So. 941. The corpus delicti need not be proved beyond a reasonable doubt, but it is enough if the evidence tends to show that the crime

> was committed. McElveen v. State, Fla. 1954, 72 So.2d 785; Graham v. State, 1943, 153 Fla. 807, 16 So.2d 59. The only question is whether the evidence of the corpus delicti is prima facie sufficient to authorize the admission of the confession. Nickels v. State, 1925, 90 Fla. 659, 106 So. 479, supra; Graham v. State, supra. See Annotation: 45 A.L.R.2d 1316 (1954).
>
> (Emphasis added).

An examination of the record cites at page 6 of the Appellant's brief shows the following: R. 670 is nothing more than the transcript of the confession itself. R. 1210 - 1218 is mostly inappropriate and devoid of contemporaneous objection with the exception of R. 1211 where the defense attorney makes a skeletal objection on the basis of the tape being cumulative as to the detective's previous testimony. The State Attorney at that page states: "Well, one, Judge, it is not cumulative, it is yet another statement of the defendant." This statement is true. The detective's testimony told the facts surrounding the statement given by the defendant and told about what the defendant said prior to the recorder being turned on. The fact that he also covered some of the material that was on the tape recording itself did not detract from the fact that the jury should be allowed to hear the words in their entirety and not just the detective's interpretation of his recollection, and can in no way be considered only cumulative.

At R. 1165 - 1175, we are again presented with a portion of the record that mostly does not apply. At 1165, the Judge states:

> "You are resisting introduction of that confession based on the - predicated upon the fact thus far the corpus delicti of any, if not all of the crimes, were not proved? Is that correct?"
>
> MR. LOUDERBACK: "Correct."

The test, then, set out by the defense attorney in regard to the corpus delicti of a homicide are that (1) the victim must be shown to be dead; the victim must be identified; that the individual's death has been caused by the criminal agency of another. That is the correct test and it was unnecessary for the doctor to classify what specific type of homicide, only that homicide existed. At 1175, the Judge states that he made notes as the evidence unfolded. The Judge goes on to state that on those facts and other facts that he has probably not specifically listed, he had concluded that there has been a showing of the corpus delicti as to all three crimes. (We are only concerned here with the question of homicide).

An examination of the Medical Examiner's testimony at 1136 - 1151 clearly shows that there were adequate facts, exclusive of the confession, upon which he was able to rely. While it is important to read all of the pages between 1136 and 1151, an examination of 1158 - 1160 shows that the Medical

Examiner was clear in pointing out that there is a difference between the manner and cause of death. The cause of death is what actually makes a person die and the manner of death is whether it was natural, homicide, etc. While it is true that the Medical Examiner, because of deterioration of the body, had to draw conclusions as to the cause of death, the manner of death from the location of the body and the fact that the victim had been abducted, was adequate for him to arrive at the conclusion that a homicide had occurred. He did not use the health history in coming to his conclusion (R. 1159) and did not state in his testimony that he based any part of his conclusion on the confession but from his knowledge that the individual had been abducted which was common knowledge even without the confession. At R. 1160, he states that the reason for his conclusion regarding the manner of death as homicide had to do with the way the body was found. It is clear that the judge felt that the Medical Examiner was able to determine the fact that a homicide existed prior to his gaining the knowledge of the statement of the defendant. (R. 1140).

It is important to note that at R. 1142, the Medical Examiner after explaining the difference between cause and manner of death states:

> "But, also, on the death certificate under manner, I have homicide."

This clearly shows that he had arrived at his conclusion based on facts known to him prior to the statement by the defendant. That is to say, he had knowledge of the location of the body, position of the body, and information given by the family concerning him being a missing person, no jewelry, etc.

If we examine the facts in the case sub judice, it is clear that the victim died, his identity was established, and there was enough proof of criminal agency, circumstantial or direct, independent of the confession to rise to the standard of proof necessary to prove prima facie case pursuant to Hodges, supra, Hester, supra and Stone, supra.

It is interesting to note that when the Appellant in his brief at page 15 discusses the fact that witness Cocoran was allowed to testify over objection concerning the manner of death, that the two conclusions that he based his testimony on were not the confession. The location of the body, etc. was clearly provable by other than the confession and the detective's report that the victim had been abducted was also clearly provable without resort to the confession. The fact that the body was found without shoes, jewelry, wallet, and that the bloodstained car of the victim had been in the hands of an individual who claimed that he got it from a "hit" are also provable without resort to the confession.

If one applies the case law cited above to the facts of this case, it is clear that even if, arguendo, the order of proof was incorrect, there was more than adequate proof to show prima facie case which would then permit the introduction of the confession which corroborated the prima facie case and added the one additional factor as to the identity of the killers.

This issue as presented by the Appellant is totally without merit.

ISSUE II

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A TRANSCRIPT OF ROBINSON'S TAPE RECORDED CONFESSION AND IN ALLOWING THE JURORS ACCESS TO THAT TRANSCRIPT DURING THEIR DELIBERATIONS.

(As Stated by the Appellant).

The Appellee herein will argue this issue in the alternate since Appellant's argument must fail for several reasons.

The Appellee will ask this Honorable Court to note that in this issue, the Appellant is not objecting to the tape recorded statement of the confession being admitted into evidence nor is he complaining about the testimony of Detective Halliday that was heard by the jury during which testimony the detective stated all of the facts that are essentially in the tape. This will be addressed at a later portion of this brief dealing with the Appellant's facile allegation of prejudice.

The Appellant at page 6 of his brief refers to R. 1136-1151, 1152, 1153, 1159, 1160, 1165-1175, 1210-1218. The Appellant at page 16 of his brief refers to page 1211-1216, 1217, 1277, 1278, 1255, 1256 to support the proposition that the transcript was entered into evidence and copies given to the jury over defense objections. First, an examination of these pages shows that there

was an objection by defense counsel only at R. 1211 and not at any of the following pages. An examination of the objection at R. 1211 shows that it was made on different grounds than those that are presented to this Honorable Court today. At R. 1211, the defense counsel states that he is objecting to a tape being moved into evidence on the grounds that it is cumulative as to the detective's previous testimony. The Appellee, however, will argue that it was clearly a separate statement of the defendant's own words and, hence, not cumulative. At page 1212, he tells the jury that he thinks they should get either the tape or the transcript but not both, but gives no further argument, so one must speculate as to the grounds upon which he relies. At R. 1212, defense counsel argues only about the jury's reading along on a copy of the transcript while the tape is being played to them. In addition to no grounds given for this objection, it doesn't deal with the original transcript going into evidence or copies going into the jury room.

The other portions of the record cited by the Appellant are silent as to objections and do not clearly show that copies were presented to the jury or taken into the jury room for deliberation. One must ask the prejudice to the defendant of the jury following along on the transcript while the tape recording is playing.

The cases of Lucas v. State, 376 So.2d 1149 (Fla. 1979) and Steinhorst v. State, 412 So.2d 332 (Fla. 1982) stand for the proposition that not only must there be a timely objection, which there was not sub judice, but more importantly, that there must be adequate argument presented to the trial court to make a reasoned decision, and that it must be on the same grounds as presented to the appellate court.

In regard to the question of prejudice, it is interesting to note that the edited version of the tape was less incriminating than the unedited tape since the facts of the robbery itself had been edited out. (R. 1212). It is important to note that at pages 1212 and 1213, the trial attorney for the defendant acknowledges that it is a clear tape and that the transcript entered was not objectionable. At R. 1213, defense counsel states:

> "I didn't see any problems with it. That presumes the tape is consistent."

The Court should note that even at this late date, the Appellant is not arguing any subsequently found inconsistencies.

The Appellant in his brief at page 16 states that it is Florida law that a transcript of a defendant's oral confession cannot be admitted into evidence unless it is signed, read and adopted by the defendant.

The issue before this Honorable Court is not as facile as the Appellant would indicate in his argument. He must

show not only error but error of sufficient magnitude to warrant reversal of the judgment of conviction. Sub judice, the Appellant cites a number of cases for the Court and cites the general propositions for which they stand as though it were beyond question that they apply to the facts sub judice. It is necessary, however, to read and interpret these cases to discern not only what the Court said in those cases but how those same doctrines would apply sub judice. One must ask what was the purpose of the rulings in those cases; what was the Court trying to protect against or safeguard? If any of the cases were specifically on point with the facts sub judice, the resolution of this issue would be as simple as the Appellant urges. However, those cases have dissimilar facts to that now before the Court. Some of the Cases relied on by the Appellant deal with situations wherein oral statement was given to a stenographer and the Court properly held that the defendant must have a chance to examine and authenticate the written transcripts to verify that it actually represented exactly what he said. The reasoning for this is obvious since a stenographer could make a mistake and a stenographic copy would be the only evidence of the defendant's statement since it constituted a written confession. Sub judice, this does not apply. The other cases relied upon by the Appellant deal with tape recordings that either were not admitted into evidence or were admitted into evidence but were of such a poor recording

quality that the jury could not easily determine what was being said. In those cases, a stenographic copy could be either in error or worked and reworked by the police technicians into what they thought it said. Again, it would be unfair to introduce this without authentication since it may, in effect, say something different than the defendant had actually said.

Again, this does not apply sub judice. It is clear that the well-thought out doctrines in the cases relied upon by the Appellant have one simple purpose - to be certain that the evidence of the confession introduced into evidence represents precisely what the defendant said without interruption, adulteration, misquotations and faithfully represents the words to protect the integrity of this confession the jury is exposed to. An examination of the facts sub judice shows an entirely different factual situation since the tape in question is perfectly clear, edited to the satisfaction of the defendant, and heard by the jury. Additionally, the transcript as well as the copies of the transcript was acknowledged by the defendant's attorney to be accurate copies of the recording itself. Additionally, he argued against the transcript and the tape going into the jury room but the judge stated that if the jury wished, he would give them the tape as well as the transcripts. (R. 1277-1278). It is important to note that there is no objection at that point by the defendant and

further, and most importantly, that it is never shown by the record that copies went into the jury room. (R.1354).

In light of these facts, one must ask what right or safeguard of the Appellant, relying on the cases he cites, has been violated?

The Court should recognize that sub judice, the testimony of Detective Halliday (R. 1196-1212) was heard fully by the jury and a clear tape was heard by the jury. (R. 1212). Defense counsel has acknowledged before the trial court that the transcript was accurate and does not at this point in time argue that there was an inaccuracy or that the transcript was in any way misleading to the jury. (R. 1212). Furthermore, while Robinson did not sign, read or adopt the transcript, he did not renounce the transcript or the tape from which it stemmed or the corroborating testimony of Detective Halliday. The Court should note that at R. 1217-1218, when a transcript of the tape is given to the jury, there is no objection by defense counsel.

The Appellant at page 16 of his brief states that he was prejudiced by the transcript's submission and states that it was the only evidence of his confession available to the jury during deliberations. It is clear that the jury had their recollection of hearing the tape only minutes before as well as their recollection of the testimony of Detective Halliday.

Furthermore, the record is clear that had the jury requested the tape itself, the Judge would have admitted it. (R. 1277-1278). Again, at this point in the record, there is no complaint made by trial counsel. One must ask, therefore, how the Appellant's facile claim of prejudice is substantiated.

The Appellant at page 17 of his brief states that the transcript was improperly used since the jury did not have the tape during its deliberations for comparison purposes. Again, the Appellee would ask "comparison for what" since the transcript of the tape, according to the statement of the defendant's own trial attorney, said the same thing.

The Appellant cites cases and makes much of the best evidence rule but his reliance thereon is misplaced. It is axiomatic that the best evidence rule is to guarantee the accuracy of evidence that is considered by the jury. Generally speaking, the original of the document is more reliable than its copy, however, sub judice, according to the defendant's own trial counsel, the transcript and the tape said the same thing. This means, of course, that the best evidence was the tape itself which was introduced into evidence and heard fully and clearly by the jury. The transcript represented nothing more than graphic representation of that tape, and was agreed to be accurate by trial counsel.

In addition to the arguments set out above, the Appellee will argue that even if error existed in allowing the original

of the transcript to go to the jury, and even if the Appellant can show that multiple copies in fact went to the jury during deliberation, and even if the Appellant can show there was proper objection and preservation of these points, there was nothing more than harmless error. The error would have been a procedural error regarding the introduction of evidence. It would not have risen to Constitutional magnitude. Even Constitutional error, however, would be considered harmless. See Sullivan v. State, 303 So.2d 632 (Fla. 1974).

ISSUE III

THE TRIAL COURT ERRED IN EXCUSING TWO PROSPECTIVE JURORS FOR CAUSE SIMPLY BECAUSE THEY EXPRESSED OPPOSITION TO THE DEATH PENALTY.

(As Stated by the Appellant).

Prior to citing case authority, the Appellee will review the portions of the record that deal with Juror Saulino and Juror Fiero. The Appellant at the bottom of page 23 of his brief states that it appears that Juror Saulino changed his mind at R. 883. It would definitely appear from a review of R. 883 and 885 that the Juror Saulino states without equivocation that he could not vote for the death penalty. At R. 883, he states:

"No, I couldn't vote for it."

At R. 885, the defense counsel asks the following question:

"Okay, does that change perhaps your feelings about your ability to be a juror in this case?"

and Juror Saulino replies

"No, no."

Juror Fiero appears to equivocate when she answers questions concerning her inability to vote for the death penalty

with words such as "Probably". R. 790. The Appellant, however, has failed to show one significant portion of the voir dire which, when examined in conjunction with Juror Fiero's answers, put the matter in clear perspective and leaves no doubt that the judge was correct in determining that her feelings would substantially impair her performance of her duty as a juror.

At R. 897, the record shows defense counsel addressing the jurors as follows:

> MR. LOUDERBACK: All right, what I'm going to ask you to do is this. If you will for a minute visualize a football field, this makes it a lot easier, visualize a football field. Down at one end zone we all know there are people who are absolutely one hundred percent supporters of the death penalty, an eye for an eye, a tooth for a tooth, I don't care, no extenuating circumstances. We have them over here to this end in the end zone.
>
> Over at the other end zone we have people that say I don't care what the proof is, death is never an appropriate sentence for any crime. Now, I am going to ask you each individually if you could place yourselves on that football field, all right? Either close down to that end zone where all of the death penalty supporters are, or close to the end where all of the death penalty opponents are, or at the fifty yard line, if that is where you feel you are, somewhere in the middle.
>
> (In pertinent part emphasis added).

If we then examine R. 900 where Mr. Saulino is stating his position and R. 903 where Mrs. Fiero is stating her position, we see that they place themselves without equivocation in the end zone. Defense counsel's own words at R. 897 stated that those in the end zone could never vote for death regardless of the proof.

Since the holding in Witherspoon v. State, 391 U.S. 510 (1968), various courts have attempted to interpret the United States Supreme Court's opinion with varying results. In the case of Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983), the United States Court of Appeals for the Eleventh Circuit took a very strict stand. In interpreting their own opinion, the Supreme Court in the case of Adams v. Texas, 448 U.S.38, 65 L.Ed.2d 581 (1981) seems to have been less strict when it stated:

> "This line of cases established the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The state may insist, however, that jurors will consider and decide the fact impartially and conscientiously apply the law as charged by the court."
>
> (65 L.Ed.2d at 589)

Fortunately, the United States Supreme Court has recently ruled in the case of Wainwright v. Witt, __U.S.__, Case No. 83-1427, decided Jan. 21, 1985. In that case, the Court by

a vote of 7 - 2 reversed the Eleventh Circuit which had previously found a Witherspoon violation when a potential juror equivocated by using the word "afraid" as to her ability to be an impartial juror.

In the recent ruling by the United States Supreme Court, they reversed, indicating that the original 1968 standard had been applied too rigidly and clarified that the appropriate standard allowed exclusion of jurors when their personal beliefs and feelings would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions or oath."

In addition, the High Court went on to indicate that the trial judge's determination is a finding of fact and should be given deference. The reason for this is obvious since an appellate court sees only cold words written on paper whereas the trial judge can view the demeanor of the juror and can hear his tone of voice. Just as an actor can give various readings to a line, each one totally changing the meaning, a perspective juror can do the same.

In the case sub judice, if we consider all of the relevant portions of the record concerning Jurors Saulino and Fiero, it is clear that pursuant to the standard as clarified in

the recent Witt holding, there was no error by the trial court in their exclusion.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING AMOS ROBINSON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

(As Stated by the Appellant).

The Appellant has divided this issue into seven parts marked A-G. An examination of those subparts, however, shows that parts D and F deal with the same mitigating factors raised under points 1, 2 and 3 of Issue V. Since Issue V will deal extensively and specifically with those issues, the Appellee will address them under that issue of the brief and, therefore, deal with only parts A, B, C, E and G under Issue IV. The following page is an index regarding the aggravating and mitigating factors with indications showing under which issue each will be treated.

A.

The Trial Court Erred In Finding That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

(As Stated by the Appellant).

The Appellant at page 26 of his brief states that the trial court has used an incorrect legal standard and that if the correct legal standard had been employed, the Judge would have been forced to find other than he did. While it is true that some of the cases relied upon by the Appellant in this subsection show courts that have used an incorrect standard, he has not specifically and conclusively shown that the trial court sub judice erred by using the wrong test.

A.

ISSUE IV — The Trial Court Erred In Finding That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

B.

ISSUE IV — The Trial Court Erred In Finding That The Homicide Was Committed For the Purpose Of Avoiding Or Preventing Arrest.

C.

ISSUE IV — The Trial Court Erred In Finding As An Aggravating Circumstance That the Homicide Was Especially Heinous, Atrocious Or Cruel.

D.

ISSUE V (Part 1) — *The Trial Court Erred In Failing To Consider And Weigh As Mitigating Circumstances That Robinson Was Under The Influence Of An Extreme Mental Or Emotional Disturbance*

ISSUE V (Part 3) — *And That His Capacity To Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Requirements Of Law Was Substantially Impaired.*

E.

ISSUE IV — The Trial Court Erred In Failing To Find That Robinson's Age Was A Mitigating Circumstance

F.

ISSUE V (Part 2) — *The Trial Court Erred In Failing To Consider And Weigh As Mitigating Circumstances The Fact That Robinson Acted Under The Substantial Domination Of Abron Scott And The Fact That Robinson Was Only An Accomplice In The Homicide And His Participation Was Relatively Minor.*

G.

ISSUE IV — The Trial Court Erred In Refusing To Consider And Weigh Numerous Nonstatutory Mitigating Circumstances.

The Appellant cites Proffitt v. Florida, 428 U.S. 242 (1976) and State v. Dixon, 283 So.2d 1 (Fla. 1973) and states with sweeping generality that the trial court employed the incorrect legal standard. He argues what constitutes the correct legal standard and how it may be violated, but then goes on to argue with the weight accorded the evidence by the trial court. This Honorable Court in many instances has been presented with a similar argument and has recognized that while an Appellant may disagree with the weight accorded to evidence or how conflicts were resolved regarding evidence, such is not reversible error since these are questions for the trier of fact. See Hargrave v. State, 366 So.2d 1 (FSC 1978) at page 5 and 6; Lucas v. State, 376 So.2d 1149 (FSC 1979) at page 1153; Smith v. State, 407 So.2d 894 (FSC 1981) at page 901.

The Appellant under this subpart states that the only evidence even suggesting the existence of this circumstance applies to Abram Scott and that this cannot be vicariously applied to Robinson. This misstatement of the facts is the basis of the rest of his argument under this subpart as well as others when he makes comparisons with other cases that have dealt with this aggravating factor. One must then examine this underlying premise to determine if there was evidence that the homicide was committed in a cold, calculated and premeditated manner without any pretense of

moral or legal justification.

The Appellant states that it cannot apply to Robinson vicariously, but a review of the record, which is also accurately reflected in the trial court's findings shows that Robinson was an active participant in each and every phase of this crime from it's moment of inception when the victim was singled out on Kennedy Boulevard to the point when he was ultimately killed and left in a remote area. The record shows (and the Appellant does not deny) that both Robinson and Scott took part in the original beating that rendered the victim unconscious (R. 1221), they were together when the victim was driven to the remote area and that Robinson was the first to attempt to kill the victim by running him over. (R. 1223, 1578, 1580). The Appellant goes on to state at page 29 of his brief that there was no evidence of a preconceived plan to kill, only a plan to rob the victim. He states that the first expression of an attempt to kill was by Scott while he was struggling with the victim. This is totally untrue. The first expression (albeit not in words) of intent to kill was by Robinson when he attempted to run over the victim. The words of Scott were subsequent to that. It is important to note that the record shows also that the first attempt to run over the victim was immediately upon arriving at the remote scene. (R. 1223). Further, there was never any intent to let him go.

The record at 1237 shows the following question and answer:

"Did he intend to let them go?"

ANSWER: "No."

Also, at R. 1221, one finds the question: "Who put him in the car?" The answer: "Me and Abram." It is clear that Robinson did not change his mind about running the victim over and failed in the first attempt only, by his own admission, "because he kept moving out of the way." (R. 1224). As to the Appellant's statement that only moments existed during which a premeditation occurred, this is also totally untrue. The record indicates that their plan , from it's inception, was not just to steal the money and jewelry from the victim, but to take his car. (R. 1232). If the matter would have been simply a robbery, they would not have had to bring the victim to a remote area. The beating at Kennedy Boulevard had already rendered him unconscious. The evidence shows that they wanted the victim's car as well, and to take his car they had to do more than temporarily silence him since they realized that when he would gain consciousness, he could report the missing vehicle and by way of its identification and license number they would be soon apprehended. In order to take both his personal belongings and to take and keep his automobile, and to be able to drive that automobile safely, they had to silence the victim. The silence could not be temporary but had to

be permanent and for that reason he was driven to a remote area and then killed. The Appellee will argue vigorously that the beating at Kennedy Boulevard which rendered the victim unconscious would have allowed their escape at that point, had that been their desire, and further, if in an abundance of caution it had been their intent to only leave the man in a remote area to give them time for escape, then they would have had to only bring him there and drop him off. They started to kill him immediately upon arriving there. (R. 1223). There was no delay since the plan had been formulated. The record shows that the victim was on his knees pleading for his life and asking them not to hurt him. At that point, if the Appellant's argument is valid, and they really did not wish to hurt him and were only trying to cover their escape, there was nothing to preclude them from leaving the scene and honoring his pleas. The Appellee will deal one by one with the cases that the Appellant attempts to use for comparison purposes in the matter sub judice.

The Appellant cites Jent v. State, 408 So.2d 1024 (Fla. 1981) and Combs v. State, 403 So.2d 418 (Fla. 1981) to support the proposition that proof of something more than premeditation alone is necessary for this aggravating circumstance. He goes on to state that the circumstance is designed to reflect the mental

state of the perpetrator and cites Mason v. State, 438 So.2d 374 (Fla. 1983). The Appellee herein has no argument with any of those propositions or the cases that he relies on for authority. Sub judice, however, the facts show that there was a greater level than that required for mere premeditation and that the facts do reflect the state of mind of the perpetrator. In Jent, supra, a reading of the facts shows a situation that closely parallels the matter sub judice. In Jent, a woman was brutalized and then placed in the trunk of a car where she was brought to a remote area and killed. Sub judice, the victim was beaten into unconsciousness, put into the backseat of his own car, driven to a remote area, further beaten and killed. In Jent, the trial court and this Honorable Court agreed that those facts did constitute the aggravating factor dealing with cold, calculated and premeditated. The Court, at page 1032 of that opinion, states:

> "Thus, in the sentencing hearing, the State will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - 'cold, calculated. . . and without any pretense of moral or legal justification."

The trial jury and trial judge sub judice were presented with facts raised to that level and they acted accordingly.

In the case of Combs, an examination of the factual statement in the opinion rendered by this Honorable Court shows a killing that was committed for the same reason as the one

sub judice. In the Combs case, the victims were taken to an isolated area and subsequently killed, for if Combs had done otherwise, the victims would have been able to seek him out. Sub judice, Robinson was forced to commit the murder since the victim, had he been left alive, could have sought him out by reporting that his attackers were in his automobile and giving the police a description of that vehicle. In the Combs case, this Honorable Court dealt with the meaning of this aggravating circumstance when the Court asked at page 421:

> "What, then, does paragraph (i) add to the statute?"

The Court goes on to state that the premeditation must be "cold, calculated, and without any pretense of moral or legal justification." Sub judice, there is no question that there was premeditation so one must ask was it also cold, calculated, etc. To answer this, one need only examine the record of his confession where one finds Robinson totally unconcerned about the victim smothering to death under the automobile and, in fact, concerned only with fulfilling his original plan, that is, to get the automobile. They actually walked to a bar and solicited aid in towing the vehicle off the victim, not to help the victim but to give them access to the fruits of their deeds. While this was occurring, they stood by and drank a beer. The Appellant may argue that these acts occurred after the death. The Appellee

will rebut this argument by stating that these acts concurrent with and after the death had to reflect on the state of mind of the Appellant and substantiate the original premeditation and a cold and calculated nature, and prove that the automobile was the object of their original plans and to obtain the automobile necessitated more than just temporarily silencing the victim.

In the case of Mason v. State, 438 So.2d 374 (Fla. 1983), this Honorable Court at page 379 deals with the elements of the heinousness of a crime as well as the cold, calculated and premeditated manner. That case stands for the proposition that heinous, atrocious and cruel pertains to the nature of the crime itself while the aggravating factor that it was committed in a cold, calculated and premeditated manner pertains to the killer's state of mind, intent and motivation, then sub judice, the case of Mason supports the Appellee and not the Appellant. Intent, motivation and state of mind were clear. The defendant wanted the victim's automobile and to take it with impunity required the permanent silencing of its owner. Upon arrival at the remote scene of the killing, there was no discussion or formulation of a plan. They immediately put into effect the plan already formulated. (R. 1223). The degree of motivation is evidenced by their willingness to walk to a bar and actually have the car

dragged off the body of the dead victim in order to complete their original intent. These last acts prove the intense level of their motivation, intent and state of mind.

The Appellant then goes on at page 27 of his brief to state that a reading of the trial court's findings reveals that the judge labored under an erroneous interpretation and that Ferguson v. State, 417 So.2d 639 (FSC 1982) and Ferguson v. State, 417 So.2d 631 (FSC 1982) and Mines v. State, 390 So.2d 332 (Fla. 1981) require reversal. First, the Appellee will state that the trial judge did not use an erroneous interpretation but even if, arguendo, that were correct, no reversal is warranted. This Honorable Court can review the facts to determine whether the judge's ultimate conclusion was correct since the long stated rule exists that if the trial judge makes the right decision on the wrong basis that decision is still valid. See Combs v. State, 436 So.2d 93 (Fla. 1983) at page 95. Furthermore, if one examines the two Ferguson cases and the Mines case, it would not bring one to the automatic conclusion that reversal is required as the Appellant contends. In Mines, supra, the Court was dealing with premeditation only in the guilt portion of the trial and the holdings of this Court in the two issues regarding the aggravating circumstances are totally not on point with the matter sub judice.

The case of Ferguson located at 417 So.2d 631 was indeed reversed as to the sentence. However, that reversal dealt with the wrong standard being applied regarding the presence or absence of two mitigating circumstances regarding emotional distress. (It is interesting to note that this case also stands for the proposition that reversal of a death sentence is not necessarily applied when one aggravating circumstance is negated and there are no other mitigating circumstances). In that case, the judge applied the test for insanity and, therefore, excluded mitigating circumstances that should have been considered. In the case sub judice, even if, arguendo, the wrong standard was applied, this Court can determine from all of the facts that the aggravating circumstance was nevertheless correct. In the case of Ferguson v. State, located at 413 So.2d 631, this Honorable Court disagreed with the trial court's finding regarding the fact that the defendant had knowingly created a great risk of death to many persons and that the defendant was under a sentence of imprisonment at the time he committed the crimes. This again is totally dissimilar with the matter sub judice since the Court, in reviewing the record in Ferguson could clearly see that not only had the trial judge used the wrong standard in making his determination but that applying the correct standard, his ultimate conclusion was incorrect. Again, sub judice even if, arguendo, the trial judge used the wrong standard, the correct standard still

brings one to the same conclusion regarding the cold, calculated and premeditated factor.

The Appellant at page 27 and 28 of his brief relies on Spinkellink v. State, 313 So.2d 666 (Fla. 1975) and Preston v. State, 444 So.2d 939 (Fla. 1984). While it is true that this Court has rendered opinions subsequent to the Spinkellink case that elaborate on the requirements for the aggravating factor of cold, calculated and premeditated, a reading of the record at R. 622 and 623 shows that the Court understood that more than mere premeditation was required and uses Spinkellink not because this was a gray area or that the facts in this case parallel Spinkellink but to illustrate the extreme limit with which the facts sub judice surpassed Spinkellink. When the judge recites the facts at R. 622 and R. 623, he comes not to the mere conclusion that there was premeditation but that the crime was cold, calculated, premeditated and without legal or moral justification. Those facts on which he relied are accurately and fully set forth in the record at those pages.

The Appellant goes on at the bottom of page 28 and 29 of his brief in an attempt to make it appear that Robinson had little time to reflect since there was no thought of killing the victim until Scott actually mouthed the words. This, however,

is untrue as can be seen from the record citations referred to above showing the acts leading up to the victim's being brought to the remote area and also the fact that the first "expression" of intent to kill was Robinson's attempt to run him over prior to Scott saying anything. The Appellant makes much of the fact that Robinson says he never planned or intended to hurt anyone. This is nothing more than a self-serving statement made by the Appellant after he had been apprehended and certainly is belied by the record of his actions. Intent being a state of mind is best determined by one's act. See State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979); State v. West, 262 So.2d 457 (Fla. 4th DCA 1972); Edwards v. State, 302 So.2d 479 (Fla. 3rd DCA 1974). Sub judice, as has been stated before in this brief, Robinson was an active participant in each phase of the crime from its first moments to its last. He did not stand back or try to dissuade his co-defendant and, in fact, he struck blows along with his co-defendant, helped put the victim in the car, and was the first to actually attempt to kill the victim.

The Appellant cites the case of Preston, supra at page 29 of his brief and states that the Court disapproved the cold, calculated and premeditated aggravating factor (note that Preston at 944 states the time-tested doctrine of circumstantial evidence can be used to show premeditation). In Preston, supra, it is

true that the Court found that the record did not show a form of premeditation required for this aggravating circumstance. The Court, however, at page 946 states that the aggravating circumstance can be found when the facts show a lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thoughts. They give as an example Jent, supra which included beating, transporting, raping and killing. If that was a close example then it certainly applies here. The Appellant's statement that the crime sub judice shows no more premeditation than that in Preston is absurd.

Finally, the Appellant relies on Cannady v. State, 427 So.2d 723 (Fla. 1983.) His reliance is misplaced, however, when one examines that case. First, it dealt with a jury override and second, the Court states at page 730:

> "During his confession appellant explained that he shot Carrier because Carrier jumped at him. These statements establish that appellant had at least a pretense of a moral or legal justification, protecting his own life."
>
> (In pertinent part emphasis added).

Sub judice, the Appellant does not even have the pretense of moral or legal justification. The record clearly shows that while he said that he did not want to hurt the victim, he repeatedly did hurt the victim, was trying to run the victim over,

even though the victim presented no risk to him, since the Appellant and his cohort had the power to overcome him without killing him had they so wished. The Appellant's attempt to parallel Cannady, supra with the matter sub judice must also fall on deaf ears when one remembers that the victim sub judice did not jump at either of his attackers but was on his knees pleading for his life. To even attempt to compare Cannady with the matter before the Court at this time requires temerity more than zeal.

ISSUE IV

B.

The Trial Court Erred In Finding That The Homicide Was Committed For the Purpose Of Avoiding Or Preventing Arrest.

(As Stated by the Appellant).

The Appellant relies on Menendez v. State, 368 So.2d 1278 (Fla. 1979) and Riley v. State, 366 So.2d 19 (Fla. 1979) for the proposition that when a person other than a law enforcement officer is killed, there must be strong proof to establish that elimination of the witness was the dominant motive for the homicide. The Appellant then states that the level of proof does not exist in this case. The Appellee will respond by asking, based on the record citations already given, why else was the individual killed? They had beaten him into unconsciousness and had brought him to a remote area. They had no reason to kill him other than the fact that permanent silence was necessary if they were going to take and keep his car. They knew from the start that they wanted his car, they had no intent to release him and started to kill him immediately upon arriving at the remote scene. (R. 1223, 1232, 1237).

The Appellant states that the facts relied upon by the Court are susceptible to a hypothesis of innocence. While it is true that a reasonable hypothesis of innocence must be resolved in favor of the defendant, the operative word is reasonable.

Sub judice, in light of the facts shown, the argument that the killing was spontaneous, in the heat of passion, in self-defense, etc. is too far fetched to be a reasonable hypothesis of innocence. The State may use circumstantial evidence in proving its case and the State is not required to disprove every possible hypothesis. Furthermore, sub judice, no reasonable hypothesis was even presented in evidence. See State v. Allen, 335 So.2d 826 (Fla. 1976); Amato v. State, 296 So.2d 609 (Fla. 3rd DCA 1974).

The record is totally devoid of anything that would show heat of passion, accident, spontaneous occurrence, etc. The record does show, however, when one considers the facts leading up to the killing, that this was viewed by the defendant as a necessary killing which can have no other conclusion than to silence the witness. This is especially true when we consider that even prior to Scott's mouthing the words about killing the victim, Robinson was already attempting to do so. Furthermore, the victim had done nothing to them, had not struck out against them, had done nothing in self-defense that would anger them and had not, in fact, even resisted their onslaught. His only plea was to be left alive. A review of the cases of Simmons v. State, 419 So.2d 316 (Fla. 1982); Armstrong v. State, 399 So.2d 953 (Fla. 1981) and

Menendez, supra shows that when they are compared with the matter sub judice, they are so far removed factually that they can serve no valuable purpose as authority.

The Appellant cites the case of Herzog v. State, 439 So.2d 1372 (Fla. 1983) for the proposition that the fact that the body was hidden in the woods does not support this aggravating factor. The Appellant has no argument with that case nor with that proposition but would ask the Court to note that the hiding of the body did not play a role in the Judge's determination sub judice.

An examination of Armstrong, supra shows that the Appellant's reliance on that case as authority is misplaced. In that case, the Court adopted the standard set out in Riley, supra that requires that strong proof be shown where someone other than a police officer is killed in order to support the aggravating factor having to do with the crime being committed to avoid arrest. In that case, there was armed resistance by one of the victims and the Court felt that it was possible to infer that the robbers had used their guns in order to increase their chances of departing with their lives. That is to say, that they may have fired in response to the victim's gunfire or fear of gunfire. The State in that case was unable to counter that hypothesis

since the State's argument concerning execution-type killing was not borne out by the pathologist's testimony which the Court referred to as "equivocal at best". Armstrong at page 963. Sub judice, there was no armed resistance nor, in fact, any resistance whatsoever and the trial court sub judice could rely not only on evidence from the scene but the defendant's own words as to the acts leading up to, during and after the commission of the crime. In the case of Menendez, supra, upon which the Appellant also relies, one need only refer to page 1282 and it becomes obvious that the facts surrounding that killing itself were not known and the State had attempted to base their argument only on the fact that the gun carried by the killer was fitted with a silencer. The Court states at page 1282:

> "Here, unlike Riley, we do not know what events preceded the actual killing; we only know that a weapon was brought to the scene which, if used, would minimize detection."

Sub judice, like Riley, we do know the events that preceded the actual killing as well as how the killing occurred. Menendez, supra provides no authority for the Appellant but would appear to support the Appellee in this case.

C.

The Trial Court Erred In Finding As An Aggravating Circumstance That the Homicide Was Especially Heinous, Atrocious or Cruel.

(As Stated by the Appellant).

First, the Appellee will state that there is no disagreement with the cases relied upon by the Appellant. The legal principles in determining whether a crime is especially heinous, atrocious or cruel are set out in the case of State v. Dixon, 283 So.2d 1 (Fla. 1973) which the Appellant refers to at page 32 of his brief. It is important to note that this aggravating factor is written in the disjunctive. The crime may be extremely heinous and atrocious or it may be cruel. The portion dealing with the heinousness and atrociousness deals with the wickedness or evilness of the crime. The cruel portion deals with the degree of pain inflicted and the utter indifference or even enjoyment that stems from the suffering.

Sub judice, the Appellee will argue that the crime was especially heinous, atrocious and cruel. It is clear from the record that the victim underwent extreme pain prior to dying and this pain began with his original beating at Kennedy Boulevard when he was beaten into unconciousness, continued at the remote scene where he was again beaten into submission, and finally

ended when the life was crushed out of him as the car was being rocked back and forth on his chest. The fact that there was utter indifference is shown by the record when the Appellant had no concern for whether the individual was dead or alive underneath the automobile and cared only to have the automobile towed so that he could use it. One sees further utter indifference when the two co-defendants stand by drinking beer as the car is pulled off of the victim. It may be true that acts that occur to a body after it is dead cannot be used in consideration but these acts can certainly be used to show the state of mind of the perpetrators and to show the utter indifference that they exhibited for the suffering of the victim throughout the whole episode.

In Dixon, supra, the Court refers to the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. The Randomhouse Dictionary, copyright 1978, published by Ballentine Books defines pitiless at page 681 as "feeling or showing not pity, implacable, merciless." The Appellee would ask what pity was shown to the victim and where the record manifests any showing of conscience on the part of the Appellant?

The victim, in addition to the beating he received, knew that he was going to die since Robinson had tried to run him over once, and the second beating to gain his submission was to

enable the killing to be effectuated more easily prior to the second attempt to run him over. We see the victim on his knees pleading with the killers. At that point, he does not die a quick, merciful death as the Appellant would lead the Court to believe since the record shows that he would be conscious for up to one minute and then due to asphysiation, would lose consciousness, but live for some time after that. The Appellant states that the rocking of the car should not be considered since the victim was dead at this point; however, the record does not so reflect. The Appellee interprets the record to show that after the victim was pinned under the car, there was no interruption, but the car was immediately rocked in an attempt to back it up. This means that in his last moments of life, he was, in fact, aware that he was being crushed to death and the automobile engine would have indeed been hot having been driven from Tampa only moments before. When one looks at all of the facts and applies the standards set down in Dixon, one cannot find that the judge erred since the crime is heinous, atrocious and cruel, there was utter indifference on the part of the killers as to the victim and the crime was pitiless with no showing of conscience.

The Appellant in his brief at page 33 states that the death occurred in about one minute. This is not accurate. He states that the unconciousness would have occurred in less than one minute . This is not accurate. He states that this was

not the type of murder that produced prolonged suffering. This is not accurate. He says this was not a slow death. This is not accurate. At R. 1267, one finds the following colloquy which makes it clear that the time elements the doctor is referring to are those that can be considered most merciful to the defendant since they depend on the degree of compression. That is to say, if the compression was total, they would apply. However, if the victim was able to get some air in, he would live longer.

> Q. If you would, sir, would you tell the jury approximately how long that would take before unconsciousness sets in?
>
> A. It would be probably less than a minute before unconsciousness, and a matter of a few minutes to death.
>
> Q. And during --
>
> A. Depending on the degree of compression. There could be just partial compression where you could get some air in and then you could live longer.
>
> (In pertinent part emphasis added).

He states that death was quick. This is not accurate. He states that the victim's awareness of impending death was brief. This is not accurate. He says that there was no evidence of extended mental anguish or impending death. This is not accurate.

He states that the revving of the automobile engine on top of the victim occurred after his death. This is not accurate.

The victim knew of his impending death and even if the Court were to find that he lapsed into unconsciousness within sixty seconds after the automobile was on his chest, the victim died in terror and pain. One minute can be an eternity when one considers the preamble leading up to it in the case sub judice.

E.

The Trial Court Erred In Failing To Find That Robinson's Age Was A Mitigating Circstance.

(As Stated by the Appellant).

The Appellant cites Peek v. State, 395 So.2d 492 (FSC 1980) and Agan v. State, 445 So.2d 326 (Fla. 1983) for the proposition that there is no per se qualifying age for this circumstance and that one may be old or young to receive the benefit of the circumstance in mitigation. The Appellee has no argument with those cases or that concept.

The Appellant cites Meeks v. State, 336 So.2d 1142 (Fla. 1976) and Meeks v. State, 339 So.2d 186 (Fla. 1976) for the proposition that one's mental capacity or mental age must be considered and that by so doing, an age that might normally not be mitigating may become so. The Appellee has no argument with that concept. A review of the Meeks, supra cases shows that the Court did give the defendant in that case the benefit of the mitigating factor due to a combination of his age (21) and his reduced IQ (unknown). There is nothing in that case, however, to state that in all like cases it must be given in mitigation nor are there sufficient facts reported in that case to determine how low the individual's IQ was or what other factors were present in

the expert's report, such as functional ability, upon which the Court relied.

In the case of Songer v. State, 332 So.2d 481 (Fla. 1975), this Court recognizes that one is responsible for one's actions at 18 years of age. The case of Peek v. State, supra upon which the Appellant relies also supports the position of the Appellee herein. In that case at page 498, the Court states:

> "The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing."

The rule, then, is that each case must stand or fail on its own individual facts.

The Appellant would have had the jury give him special consideration because of his age. He states that it is not just the chronological years but his chronological years when considered in conjunction with his low IQ.

The record shows that although he had a low IQ, apparently he was able to function well in the real world. He held a job and was considered one of the better employees (R. 1518, 1522), and further, did well in high school up to and including his sophomore year in spite of the fact that he skipped a great deal of classes. (R. 1417, 1472). He was also considered intelligent by his aunt who was close to him and was a registered nurse. (R. 1501, 1502, 1505).

Furthermore, when the Appellant states that he has a mental age based on IQ of only twelve years old, he either misinterprets that scale or misunderstands the testimony in that regard. The expert witness did indeed testify that his mental development would be at the twelve year level; however, this is not on a standard chronological scale. Sixteen years is the maximum on this scale and by example, Einstein would have been considered sixteen years old on this same scale. (R. 1446, 1447).

The Appellant was twenty years of age when this brutal murder occurred. He had a previous history and familiarity with the criminal justice system that made him anything but an inexperienced tyro. Additionally, his claims that one should consider his low IQ are baseless since his IQ was no lower than many people who are gainfully employed and supporting families. In fact, his IQ did not preclude him from being able to function quite well in the real world. This is evidenced by his school marks as well as his employment.

In the case sub judice, the Court is not presented with a jury override but with a judge and jury who both considered his age but were unpersuaded. Peek, supra says that this question must be resolved depending on the facts on a case by case basis. This, then, is a question of weight and this Court has dealt often, and refused to reverse on that basis alone. See Lucas, supra Smith, supra and Hargrave, supra.

This issue is totally without merit.

G.

The Trial Court Erred In Refusing To Consider And Weigh Numerous Nonstatutory Mitigating Circumstances.

(As Stated by the Appellant).

The Appellant cites Songer v. State, 365 So.2d 969 (Fla. 1978), Eddings v. Oklahoma, supra and Lockett v. Ohio, 438 U.S. 586 (1978) for the proposition that all evidence in mitigation must be considered and weighed against the evidence in aggravation. The Appellee has no argument with these cases or their concept.

The Appellant states that Robinson's low intelligence level should have been considered in mitigation. The evidence concerning this was heard in detail by the judge and jury. The Appellant states that Robinson came from a broken home and this should be considered in mitigation. The judge and jury heard the evidence in this regard. The Appellant states that Robinson was an excellent and trusted employee and this should be considered in mitigation. The judge and jury heard evidence in this regard. The Appellant states that Robinson is capable of being rehabilitated and that this should have been considered in mitigation. The judge and jury heard the evidence in this regard. The Appellant states that Robinson demonstrated remorse and that this should be considered in mitigation. The judge and jury

heard the evidence in this regard. (The Appellant cites R. 1393 to show remorse but a reading of that entire page shows that the tears and limited remorse came after the Appellant stated that he didn't want to go to prison. See also R. 1396). The Appellant states that Robinson confessed and cooperated with the authorities and that this should be used in mitigation. The judge and jury heard the evidence in this regard.

At R. 1653, the judge directed the jury as follows:

> "Among the mitigatin g circumstances you may consider, if established by the evidence are:
>
> The defendant acted under extreme duress or under the substantial domination of another person;
>
> The age of the defendant at the time of the crime;
>
> Any other aspect of the defendant's character or record, and any other circumstances of the offense."
>
> (In pertinent part emphasis added).

The judge then went on to state that all evidence tending to establish a mitigating circumstance should be considered and that the jury is to determine the weight that is to be given. This, then, is not a question of the jury not hearing the evidence or not being instructed to consider it, but solely that the judge and the jury after consideration were not persuaded. This Court

has held that the Appellant's disagreement with the weight accorded to various factors by the trier of fact is not reversible error. See Lucas, supra, Hargrave, supra and Smith, supra.

While the judge and jury heard evidence supporting the non-mitigating factors that are stated above, they also heard evidence that countered these non-statutory mitigating circumstances. The Appellant in various arguments under this issue attempts to portray himself as a gentle individual who never meant to harm anybody. This is belied by the record concerning his active participation in this crime and also ignores the fact that evidence was presented that he committed a jailhouse rape (R. 1389, 1511, 1512, 1535) and that his own expert witness stated that he had a passive/aggressive personality and could continue to do "bad" things. (R. 1359, 1416). There is also evidence in the record concerning previous aggravated battery upon his sister. (R. 1478).

When all of the above is considered, it is impossible to come to the conclusion that the judge and jury misweighed these factors and reversal is required.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON SEVERAL STATUTORY MITIGATING CIRCUMSTANCES.

(As Stated by the Appellant).

The Appellant under this issue deals with three statutory mitigating factors:

(1) that the capital felony was committed while the defendant was under the influence or extreme mental or emotional disturbance;

(2) that the defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor;

(3) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Number 2 above overlaps with Issue IV, the second part of paragraph F, and that praagraph will therefore be treated in its entirety under this issue.

The trial court included in its jury instructions the fact that the jury could consider as a statutory mitigating circumstance that the defendant acted under extreme duress or under the substantial domination of another person. The question in regard to that portion of the issue then does not present this

Court with the question of the judge not having read the instruction. The record is clear, however, that there was no evidence shown that would indicate that he acted under extreme duress or under the substantial domination of another person. The jury heard the instruction and all of the relevant evidence yet, like the judge, were unpersuaded. This is a question of weight. See Lucas, supra, Smith, supra and Hargrave, supra.

As to the remaining statutory factors that were not read to the jury, we must first re-examine the relevant portions of the record which are located at 1595-1599 and 1657. The pages starting at 1595 show the charge conference and we may examine there what objections were properly made by defense counsel. R. 1657 shows a skeletal renewal of all motions by defense counsel but, of course, the impact of that renewal has no effect if the original objections were not made or were inadequate.

At R. 1595, the Court states:

> "The crime with which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance? We will not give that one."

This Court should note that at that point, where one would normally expect an objection and argument from the defense counsel

if he felt that the judge was committing error by not giving it, there was none. The Court then goes on to state:

> "The victim was a participant or consentor. We will not give that."

At this point again, one would expect an objection if defense counsel felt that the Court's refusal to give this instruction was improper. There is no objection. The Court goes on to state:

> "The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor."

One would expect to find an objection at this point and indeed does. The trial counsel for the defendant voiced his objection stating that the confession showed that Mr. Scott committed the crime and that while the defendant was in the area, he was only standing there but did nothing to stop it. This argument upon which the defense counsel based his objection was without merit since that is not what the confession or any of the other evidence showed. The Appellant was an active participant in each and every phase, was the first one to attempt to drive over the victim and, in fact, it was <u>his idea</u> to kill the victim. (R. 1578). The Appellee will not argue with the

concept that a judge should not impose his thoughts on the jury or refuse to give mitigating circumstances upon which there is evidence, however, not only is there no evidence that the Appellant was a minor participant but the evidence clearly shows that he was a major participant. Not only was the judge not required to read this instruction but had he done so, it would have served no purpose other than to confuse the jury.

The Court goes on at R. 1596:

> "The defendant acted under extreme duress or under the substantial domination of another."

At this point, trial counsel requested that instruction and the judge although apparently not convinced of the validity of that mitigating factor, agrees that "I think that you sufficiently opened the door to warrant getting that." (This proves the trial judge understood the correct standard).

The Court goes on to state:

> "The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law is substantially impaired. I will not give that."

At this point, the defense counsel asked that the instruction be given "based on the testimony we heard today."

The judge then refused to give it and if we examine the basis of the defendant's argument supporting his objection and

review the testimony that was heard, it is clear that there was no evidence to support this mitigating factor. Additionally, if one reviews the record prior to the penalty phase at R. 1234 and 1573, we find reference to the fact that the defendant had used cocaine and alcohol that day, but there was no indication of a time frame or the quantity. At. R. 1234, it appears that he knew what he was doing and at R. 1573, when Detective Halliday is testifying, he states as follows:

> Q. Did you get into any discussions about the alcohol consumed and narcotics consumed?
>
> A. Yes, we did.
>
> Q. Okay.
>
> A. Mr. Robinson told us that Abron Scott was the one who had consumed the most alcohol and drugs. That he, himself, had not consumed that much, that he was totally aware of what was going on and knew what he was doing at the time.
>
> Q. Did he have an opinion as to Abron Scott's sobriety?
>
> A. He said Abron Scott had consumed some alcohol and they snorted some cocaine, but he said Abron Scott was driving the vehicle and he didn't appear to be out of control or not aware of what he was doing.

It would seem from all of the above that there was no evidence presented to show that the capacity of the defendant

to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Again, we are faced with a situation where the trial court was not only correct in not reading that instruction but to do so would have been incorrect because it would have served no other purpose than to confuse the jury.

The Appellee herein will rely on Fla. R. Crim. P. 3.390(d)D which states:

> No party may assign as error grounds of appeal giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.

An examination of the charge instruction, line by line, shows either no objections or inadequate objections, or objections without valid grounds. The Court will not reverse when there has been improper preservation. See Jent v. State, 408 So.2d 1024 (Fla. 1982); Vaught v. State, 410 So.2d 147 (Fla. 1982) and McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

The Florida Standard Jury Instructions advise the judge to present mitigating and aggravating factors to the jury if evidence has been presented. The Appellee believes that that note to the judge is correct and in no way contravenes the holdings

in Eddings v. Oklahoma, supra, Lockett v. Ohio, supra, Songer v. State, supra or Cooper v. State, 336 So.2d 1133 (Fla. 1976). Those cases say that the judge may not restrict any relevant evidence. The trial judge sub judice did not restrict any relevant evidence nor did he preclude defense counsel from arguing to the jury anything that they felt relevant to mitigation. A review of the instructions given to the jury further shows that they were formally instructed to consider all evidence and everything in mitigation to which evidence had been presented. R. 1653, 1654, 1655.

In summary, the judge's refusal to read mitigating factor (1) above regarding extreme mental or emotional disturbance was not objected to or argued, hence, it is not preserved for appeal. The judge's refusal to read mitigating factor (2) above regarding the Appellant's playing only a minor role was not supported by any evidence, since he was a major participant. The judge's refusal to read mitigating factor (3) above regarding the ability to conform his conduct to the requirements of law is not supported by any evidence as the record shows to the contrary that he was fully aware of what he was doing.

In short, for all of the reasons cited above, the trial judge acted correctly and if this Honorable Court were to hold

otherwise, then trial judges in capital cases would be required, in an abundance of caution, to read all mitigating factors lest the defense attorney argue that in his eyes, there was evidence to support claims of error.

ISSUE VI

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE, AS REBUTTAL EVIDENCE, THE TESTIMONY OF THE PSYCHOLOGIST WHO HAD TESTED AND EXAMINED ROBINSON'S CO-DEFENDANT, ABRON SCOTT.

(As Stated by the Appellant).

The Appellee herein will take exception to some of the factual statements upon which the Appellant relies for support of his argument under this issue since many of those facts are more in the nature of interpretations. The Appellant, at page 45 of his brief, states that the introduction of Appenfeldt's testimony was not harmless since it invited the jury and the sentencing judge to draw comparisons between Robinson and Scott which were improper. An examination of page 44 of the Appellant's brief, however, shows that the Appellant admits that the defense had asserted to the jury that Robinson could have been dominated by his co-defendant Scott. The question for the trial judge, then was, had the door been opened for the State to rebut the defense's assertion? They invited comparisons. The Appellant cites only Carter v. State, 332 So.2d 120 (Fla. 2d DCA 1976) but that case fails totally to be on point with the matter sub judice. In the Carter case, the trial court held that a rebuttal witness had been properly excluded because

her testimony would have only gone to the question of propensity and bad character. That case goes on to state that one cannot introduce evidence attacking character unless character has been put into issue. Those points, however, have no bearing on the case sub judice. Also, that case held that the testimony in rebuttal concerning the fact that the defendant had cheated on his wife was not proper when the question was not in dispute since the defendant had already admitted that in testimony. None of these determinations by the Court in the Carter case, however, even vaguely shed light on the question sub judice since the facts are totally different and the Appellant in his brief at page 44 admits that the only objection made to Appenfeldt's testimony on rebuttal was as to relevancy. R. 1552, 1553-1555. That objection was skeletal and appeared to have been a general objection to Dr. Appenfeldt's being able to testify at all. After that point, when the doctor's testimony began, it would have been the duty of defense counsel to make timely objections with specific argument and that argument would have to be the same as the one presented to this Court for appellate review. See Clark v. State, 336 So.2d 331 (Fla. 1978), Lucas v. State, 376 So.2d 1149 (Fla. 1979); Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

The Appellant argues that IQ is irrelevant, but an examination of the record of that testimony shows that it was not objected to contemporaneously and ironically, that it was pursued in detail on cross-examination by the trial counsel for the defendant himself. R. 1418 et seq.

The proper test to be applied is whether or not the trial court abused its discretion in allowing the rebuttal testimony concerning the personality and IQ of Mr. Scott. The Bedrock case often referred to is Williamson v. State, 111 So. 124, 127 (Fla. 1926). That case at page 127 sets out the doctrine that gives Court discretion in the admission of rebuttal testimony and states that in the exercise of this discretion by the Court, it will only be reversible error if there is "manifest abuse" of the discretion. In the case of Kirkland v. State, 97 So. 502, 509 (Fla. 1923), the Court at page 509 states that it is permissible to allow rebuttal testimony or evidence to "discredit his [the defendant's] evidence". (Parenthesis added for clarification). In the case of Duncan v. State, 291 So.2d 241 (Fla. 2d DCA 1974), the defendant introduced evidence to show it was unlikely that he would commit the crime because he was impotent. The Court found that rebuttal evidence to show that he was not impotent was permissible. In the case sub judice, the defendant at the penalty phase was attempting to convince

the jury that it was unlikely that he would be the leader and would be likely to follow Scott. The Appellee will argue that it was therefore clearly permissible and within the scope of the Court's discretion to allow testimony to show that it was not a valid assertion to show that the defendant was likely to be the follower in this case since Scott was also a follower. This rationale squares with Williamson, supra and Kirkland, supra.

The Appellant makes assertions that IQ plays no part in whether a person could be domineering but an overview of the testimony does not appear to state that. Additionally, those facts only went to support the conclusion reached by Dr. Appenfeldt that Scott was drug dependent and a non-assertive personality. If the defense at trial could interject the fact that the defendant was a dependent person, easily led, and imply that Scott was the leader, then clearly, this opened the door for the State to bring in testimony, supported by facts, that Scott was also a dependent personality. While it is true that this might not be conclusive as to who led whom, to claim that it is not relevant is thin argument indeed.

The Appellant makes the statement at page 44 of his brief that dominance is not a function of IQ. He cites record pages R. 1439 and 1561. A review of those pages, however, shows

that this is a misstatement or misinterpretation of the testimony at that point. The testimony at those pages and the pages surrounding that portion of the record indicate that IQ is not necessarily a function of leadership. That does not in any way prohibit its consideration as one factor. Also, it would appear from this testimony that the witness was saying something totally different about individuals with high IQ's and individuals with low IQ's; that is to say, two individuals with high IQ's may not follow one another based on IQ. But the testimony at 1439 would make it appear that a "dull" individual may follow someone brighter since the brighter individual (albeit not extremely bright) could formulate plans but the retarded individual could not.

If IQ plays no part in personality testing and evaluating, why then did Dr. Merin who was called as an expert witness by the defendant himself, go over the IQ tests that were given to the defendant in such detail? An examination shows many pages dealing with this not only by the defendant's expert witness, Dr. Merin, but also elaborated in detail by the defense attorney at trial. (R. 1418 et seq).

Even if, arguendo, this Honorable Court were to find that Dr. Appenfeldt's rebuttal testimony was improper, the

Appellee will argue that there has been no showing of prejudice by the Appellant since at page 45 of his brief, he does not even suggest how prejudice might arise other than stating that comparisons could be drawn. This, however, was the very purpose for which the defendant at trial began the introduction of evidence concerning his own non-assertive personality.

In the alternate, even if this Honorable Court were to determine that the testimony was irrelevant, an abuse of discretion by the trial judge in its admission, and prejudicial to the defendant, the Appellee will argue that this can be considered nothing more than harmless error since even if this testimony were not admitted, the defense had failed in any way to show that Robinson was, in fact, the individual being led. The facts indicate that he was an active participant. See Sullivan v. State, 303 So.2d 632 (Fla. 1974) regarding the harmless error doctrine. While Sullivan deals with the question of harmless error as concerns guilt, the Appellee believes that it would also be appropriate authority concerning harmless error during the penalty phase.

In short, the argument presented by the Appellant in this issue is based on a misstatement or misinterpretation of what the testimony said and further, there was either inadequate objection or no objection at the appropriate portion of the record.

The Appellant cites only one case in support of his argument, that being Carter v. State, supra. A reading of Carter, however, shows that it has no relationship whatsoever either as to law or factual similarity with the matter sub judice and there has been no abuse of discretion that would require reversal in accord with Williamson, supra and Kirkland, supra.

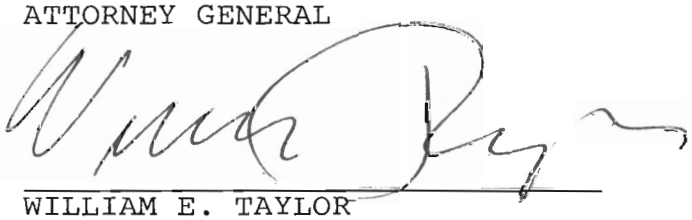
CONCLUSION

Based on the foregoing arguments, case authority and citations to the record, it is clear that the Appellant's many-faceted arguments are without basis either because they are factually dissimilar to the case authority on which the Appellant relies or were not adequately preserved for review by this Honorable Court or cannot avoid the case authority and legal argument precisely on point which has been presented by the Appellee.

The Appellant's arguments are without merit and the Appellee asks this Honorable Court to affirm the judgment of the trial court both as to the guilt and penalty phases of this case.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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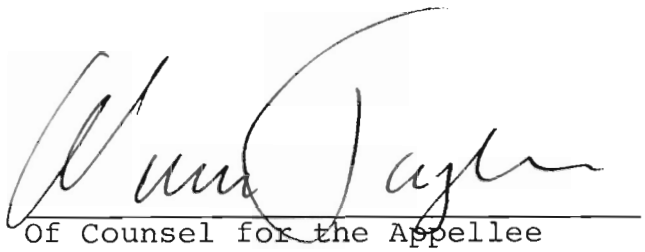
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to W.C. McLain, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830 on this 23rd day of January, 1985.



Of Counsel for the Appellee