IN THE FLORIDA SUPREME COURT

AMOS EARL ROBINSON, :

Appellant, :

vs. : Case No. 65,506

STATE OF FLORIDA, :

Appellee. :

:

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On November 17, 1983, a Pinellas County grand jury indicted Amos Earl Robinson for the first degree murder of Carlos Alberto Orellana. (R49) The State, on November 29, 1983, filed an information charging Robinson with a robbery and kidnapping arising from the same episode. (R31) Upon the State's motion (R633,645), the court consolidated the cases for trial. (R646) Robinson proceeded to trial, and the jury found him guilty of each of the three charges on April 19, 1984. (R41,42,565,1357-1358) After hearing additional evidence at the penalty phase of the trial held on May 7, 1984, the jury recommended a death sentence for the murder. (R588,1658-1661)

Circuit Judge Fred L. Bryson adjudged Robinson guilty of all three charges on June 22, 1984. (R43-46, 614-616,1677-1689) On the same day, he sentenced Robinson to 15 years for robbery, 15 years for kidnapping and death for the murder. (R43-46,614-616, 617-625,1688-1689)

In support of the death sentence, Judge Bryson filed written findings as to the aggravating and mitigating circumstances. (R617-625)(A1-9)[1/] The court found five aggravating circumstances: (1) that Robinson had been previously convicted of a felony involving violence--a robbery and a sexual battery (R617)(A1); (2) that the homicide was committed during a kidnapping (R618)(A2); (3) that the homicide was committed to avoid arrest (R619)(A3);

1/ References to the appendix to this brief are designated with the prefix "A."

(4) that the homicide was committed for pecuniary gain (R620)(A4); (5) that the homicide was heinous, atrocious or cruel (R620-622) (A4-6); and (6) that the homicide was cold, calculated and premeditated without any pretense of moral or legal justification. (R622-623)(A6-7) The court rejected all the defense evidence presented in mitigation (R1391-1535) and found no mitigating circumstances. (R624-625)(A8-9)

Robinson timely filed his notice of appeal to this Court. (R755)

STATEMENT OF THE FACTS

Carlos Orellana lived in Tampa in the same house with his mother, his sister and his sister's husband and children. (R1041-1042) On Friday, October 21, 1983, Orellana was last seen at home between 9:30 p.m. and 10:00 p.m. (R1056-1057) He was taking a shower and preparing to leave for the evening. (R1048-1049,1044) Although Orellana occasionally stayed out all night, his sister, Maritsa Phillips, testified that he always told her before he did so and that he never stayed out all night on Fridays because he worked part-time at a Sears store on Saturdays. (R1042-1044,1054-1055) Orellana visited a bar called the Old Plantation, and the assistant manager saw him leave between 11:30 p.m. and midnight. (R1059-1061) Orellana did not return home or work on Saturday. (R1050-1051) Around midnight on Saturday, Maritsa Phillips reported her brother missing. (R1051-1052)

At approximately 8:00 p.m. on Saturday, Duneden Police Officer Robert Gualtieri stopped a light colored Toyota for a traffic violation. (R1069-1070) Before Gualtieri approached the vehicle, the driver sped the car away. (R1070) A chase ensued. (R1070) The Toyota ran over a stop sign, was involved in an accident and stopped in front of a house. (R1070) The four black males who occupied the automobile fled on foot. (R1070) Officer Gualtieri detained one of them, Larry Tillman. (R1071-1072) Later, Maritsa Phillips identified the Toyota as her brother's car. (R1051) There were some blood stains on the rear seat and floor of the car which matched Orellana's blood, type B. (R1052,1098-1115)

Larry Tillman identified the other occupants of the car as Amos Robinson, Abron Scott and Isaiah Martin. (R1086-1087) He testified that he was visiting at Martin's house on Saturday morning, October 23, 1983. (R1085-1086) Scott and Robinson drove up in a beige, 1980 Toyota and asked Martin and Tillman to go for a ride with them. (R1087) Martin and Tillman entered the car and the four men drove to a small road near some railroad tracks. (R1087) At that location, Scott and Robinson threw out the documents and other items contained in the glove compartment of the car. (R1087-1088) These items belonged to Orellana and consisted of a blue bank bag, credit cards, a driver's license and other documents. (R1046-1048,1064-1065,1074-1077) A resident who lived near the railroad found the items the following day and telephoned the police. (R1062-1069) At the time Scott and Robinson were throwing the items from the car, one of the other two men asked about the source of the items. (R1088) According to Tillman, Robinson replied that the material had come from a "hit" he and Scott had made the previous night. (R1088) Tillman understood "hit" to mean a robbery. (R1089-1092) Robinson did not say that he had hurt anyone. (R1095-1096) Shortly after the items were thrown out of the car, the chase involving Officer Gualtieri occurred, and Tillman was apprehended. (R1093-1095)

Leroy McDuffy, an employee with Overstreet Paving Company, was working on Gim Gong Road in Pinellas county on Wednesday, October 26, 1983. (R995-996) The road was dirt with loose sand. (R997) Near the end of the road, McDuffy found an automobile jack and a hammer. (R997) He observed three tire

marks in the sand at the same location which appeared to be the result of a car having been stuck in the sand. (R997) Another member of the paving crew found a pair of shoes nearby. (R998) Later, while operating a piece of equipment used to clear mud from the roadway, McDuffy discovered a body resting in a depression in an area of palmetto woods approximately 40 feet from the road. (R998-999) The body was subsequently identified as Carlos Orellana. (R1135)

Deputy Timothy Goodman arrived on the scene around 3:30 p.m. (R1008-1009) He secured the area and called for a homicide detective and crime scene technicians. (R1010) He also instructed McDuffy and his co-worker to replace the jack, hammer and shoes they had removed from the road. (R1011) The technicians recovered those items (R1015-1022) along with two beer cans (R1022-1024) and a matchbook. (R1024)

Associate Medical Examiner Edward Cocoran viewed the body at the scene before removing it for an autopsy. (R1129-1131) He found it on its back in the depression in the ground, the back was up one side of the depression and the legs were up the other. (R1130) Arms were flexed with the right arm underneath the body. (R1130,1152) The body was fully clothed except for shoes (R1130-1131), but no items of value were present. (R1192) Due to decomposition, much of the soft tissue was absent. (R1131) However, Cocoran found no evidence of injuries or trauma of any kind. (R1130-1135) A complete autopsy also failed to reveal any injuries. (R1133-1135) Cocoran could not ascertain a cause of death; he could not exclude death from natural causes. (R1135, 1154-1159)

Over defense counsel's objections (R1136-1151), the medical examiner was allowed to testify that in his opinion the manner of death was homicide by asphyxiation. (R1152-1153) He reached that opinion even though he could not eliminate death by natural causes. (R1154-1160) Cocoran reasoned that the location of the body and the detective's report to him that the victim had been abducted was sufficient to establish homicide as a manner of death. (R1159-1160) Defense counsel objected to the use of the information about an abduction as a basis for the opinion because the source of the information was Robinson's confession which could not be used until the corpus delicti for a homicide was established through independent evidence. (R1136,1145-1151)

Robinson and Scott were arrested on October 26, 1983, at Robinson's mother's home in Jackson County. (R1116-1127) Detective John Halliday of the Pinellas County Sheriff's Office flew to Jackson County, interviewed Robinson and obtained a confession. (R1179-1212) Halliday first interviewed Robinson without a tape recording, and then, tape recorded the statement. (R1198) The tape recording, a transcript of the recording and Halliday's testimony about the contents of Robinson's unrecorded statements were introduced into evidence. (R670,1198-1215) Robinson objected to the introduction of the confession on the ground that a corpus delicti had not been proven. (R1165-1175) And, he also objected to the introduction of the transcript of the taped statement. (R670,1210-1218)

Halliday testified that Robinson first said that he and Scott found the car. (R1239) The detectives then confronted him

with the information they had about the case. (R1239) Robinson began to cry and said that he did not want to go to prison. (R1206-1201,1239-1240) Robinson then related his involvement. (R670,1201,1238) His statement was the only evidence of the events surrounding the homicide.

Robinson stated that he and Abron Scott decided to rob someone. (R1201,1219-1221,1232) While walking down Kennedy Boulevard in Tampa, they saw a man approaching his car in the parking lot of the Old Plantation bar. (R1201-1202,1219-1220,1232) Scott knocked the man to the ground, beat and choked him. Robinson hit the man two or three times. (R1202,1219-1222) The man appeared to be unconscious and was bleeding from his mouth. (R1202, 1219-1222) They placed the man in the back seat of his car, and Scott drove the vehicle through Tampa into Pinellas County to the city of Oldsmar. (R1202,1221-1222) There, they proceeded down a dirt road where they stopped and pulled the man from the car. (R1202-1203,1223) He now appeared to be conscious, and he and Scott began fighting. (R1203,1223-1224) Robinson moved to the driver's position in the car and attempted to run over the man with the car. (R1203,1223-1224) He stopped because he was afraid that he would also hit Scott. (R1203,1224) Scott choked the man until he was on his knees and too weak to move. (R1203,1224) The man told them to take the car but not to hurt him. (R1204-1206, 1235) Scott said, "We ain't leaving this mother fucker alive." (R1206) Scott entered the car and drove it over the man. (R1203, 1225-1226) The car became stuck in the sand on the shoulder of the roadway resting on top of the man. (R1203,1206,1225-1226) He

was buried into the sand with the undercarriage of the automobile on top of him. (R1206,1226)

Scott and Robinson were unable to free the car from the sand. (R1207,1226-1227) They could not drive the car out of the sand and attempts to jack the car up were unsuccessful. (R1207, 1226) The two men walked down the road until they reached the Maverick bar. (R1208,1227) There, they enlisted the help of two men and their pick-up trucks. (R1208,1227-1228) These two men attached a chain to the Toyota and pulled it from the sand with their truck. (R1203,1227-1228) Because it was nighttime and because Scott stood in a position in front of the Toyota, the men assisting in freeing the car never saw the man who had been run over. (R1208,1228) The men gave Robinson and Scott a beer and left the area. (R1208-1209,1228-1229) Robinson said that he was already high on alcohol and cocaine. (R1234-1235) After drinking the beer, Robinson and Scott removed the body from the shoulder of the road and placed it in depression in a wooded area. (R1209-1210,1229-1231)

After Robinson's confession was admitted, Associate Medical Examiner Edward Cocoran testified. (R1265-1272) He stated that the events described in Robinson's statements were consistent with asphyxiation as a cause of death of the victim. (R1265) The asphyxiation would have been caused by chest compression. (R1265) Unconsciousness would have occurred for the victim in less than one minute. (R1267-1268) Death would have occurred within a few minutes. (R1267-1268)

During jury selection, the trial court excused several prospective jurors for cause because of their beliefs against

capital punishment. (R905-906,967) Two of those jurors, Arthur Saulino and Helen Fiero, were excused even though they did not make it unmistakably clear that their beliefs would prevent them from considering death as a possible penalty. (R789-790,814,856-860,883,885-887,900,903,905-906) Robinson objected to their excusal for cause. (R905-906)

The State and Robinson presented additional evidence during the penalty phase of the trial. (R1385-1581) In aggravation, the State introduced certified copies of judgments against Robinson for robbery and sexual battery. (R1388-1390) Robinson introduced testimony from several witnesses in mitigation, including a detective who assisted in taking Robinson's confession (R1391-1399); a clinical psychologist who had examined and tested Robinson (R1402-1467); Robinson's mother (R1469-1483); his father (R1486-1500); his aunt (R1500-1513); and his employer. (R1513-1535) In rebuttal, the State presented testimony of a detective (R1568-1580) and a psychologist who had examined Robinson's co-defendant, Abron Scott. (R1553-1568)

Dr. Sidney Merin, a clinical psychologist, examined and tested Robinson. (R1405-1411) He found Robinson to have an IQ of 74, in the borderline retarded range. (R1418-1434) This level of intelligence translates to a mental age of 12 and the learning level of a 7th grader. (R1435) In addition to his low intelligence, Robinson's personality is poorly developed. (R1437) Merin concluded that Robinson's deprived background left him emotionally remote, unable to understand human emotions and without a meaningful relationship with society's value system. (R1437) His emotional

development is as if he was raised in isolation without role models. (R1440) Merin did find in Robinson the ability to learn these personality skills if exposed to them; Robinson showed remorse and appeared capable of learning conscience. (R1440-1441) Robinson is also a follower. (R1439) He is prone to follow someone of a stronger, more aggressive personality. (R1439) The person with a more aggressive personality need not be more intelligent than Robinson. (R1439-1442) Merin found that Robinson's ability to adapt to his environment is poor. (R1442) And, the adaptive ability to conform his conduct to the law would be impaired if Robinson was under the influence of a more dominate person. (R1442) Finally, Merin concluded that Robinson was easily mislead by others and that he personally lacked the thinking ability to mislead anyone. (R1442-1444)

Robinson's mother, Mary Robinson, testified about her son's background. (R1469-1483) Amos was the middle child of seven children growing up in Graceville in Jackson County. (R1469-1471,1476) His father, Willie Evert Robinson, left the family before Amos was born. (R1471) Amos would visit him in Tampa during the summers, and when he turned 14, he lived with his father permanently. (R1471-1472,1487-1489) As a child, he was easily led and influenced by other people. (R1476-1477) Amos went to school in Graceville, and he always had a job after school. (R1472-1473) The money he earned was contributed to the support of the family. (R1473-1474)

Willie Robinson testified that Amos was 14 years old when he moved to Tampa to live with him permanently. (R1489)

Amos went to school in Tampa for awhile but stopped and began working full time. (R1490) He worked at a service station and then at Morrison's Cafeteria which was his place of employment at the time of his arrest. (R1490-1491) Amos talked to his father about the homicide. (R1492) He told him that he did not kill the man but was present when Scott killed him. (R1492) Amos said that he did not want to hurt the man. (R1492)

Robinson's aunt, Ruby Speights, also testified. (R1500-1512) She is a nurse in Tampa. (R1501) Speights said she was fairly close to her nephew and that they had a good relationship. (R1502) She characterized him as easy going, good hearted and a hard worker. (R1502-1503) Furthermore, she described him as a passive, nonaggressive person--a follower. (R1503-1504)

Marla Dubinsky was the food service director at Morrison's Cafeteria and Robinson's employer. (R1514-1515) She described him as an excellent employee. (R1518-1520) In fact she said that he was the best employee at his level of employment she had. (R1520) He started work in the kitchen as a pot washer but he also worked with the catering and deliveries portion of the business. (R1516-1517) Dubinsky trusted Robinson completely to the point of allowing him to make bank deposits alone. (R1517-1519) Sometimes the bank deposits consisted of up to $6,000 in cash. (R1518) She never had a problem of any kind with Robinson. (R1518-1519) He was a model employee who was always extra helpful to his co-workers. (R1519-1520)

Detective Bruce Hauck who participated in investigating this case testified for Robinson. (R1391-1398) He said that

Robinson was cooperative and gave a statement regarding his involvement. (R1392) Hauck testified that the statement appeared to be truthful and that other evidence in the case corroborates Robinson's statement that Scott drove the car over the victim. (R1393-1394) Furthermore, Robinson never indicated that he intended to kill someone that night. (R1394) Hauck was also of the opinion that Robinson expressed some remorse at the time he gave the statement. (R1393) He cried and said he did not want to go to prison. (R1393-1394) On rebuttal, the State presented testimony from Detective Halliday who said that in his opinion Robinson expressed no remorse. (R1568-1571)

Over defense counsel's relevancy objections (R1543-1552), the State presented testimony from the clinical psychologist who had examined Robinson's co-defendant, Abron Scott. (R1553-1567) Dr. Linda Appenfeldt stated that she was appointed to perform a confidential psychological evaluation on Abron Scott. (R1555-1556) She employed intelligence tests and analyzed his personality. (R1557-1556) Tests showed Scott's IQ to be 50 which is in the mentally retarded range. (R1557) Appenfeldt concluded that Scott has a nonassertive personality and is a follower. (R1558-1559) Furthermore, his is drug dependent and uses drugs on a continuous and habitual basis. (R1558-1559) Appenfeldt had not examined Robinson and could not answer which of the two was the more assertive or aggressive personality. (R1564)

At the close of the penalty phase evidence, Robinson requested jury instructions on several statutory mitigating circumstances. (R1595-1599) Among the instructions the court denied

were the following: (1) that Robinson was under the influence of extreme mental or emotional disturbance (R1595); (2) that Robinson was an accomplice in the crime committed by another and his participation was relatively minor (R1595-1596); and (3) that Robinson's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R1596-1597)

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.

It is well established that a defendant's confession cannot be admitted until the State has proven the corpus delicti by independent evidence. E.g., State v. Allen, 335 So.2d 823 (Fla.1976); Frazier v. State, 107 So.2d 16 (Fla.1958). Circumstantial evidence can be sufficient. Ibid. And, while proof beyond a reasonable doubt is not required, the evidence must be substantial. Allen, 335 So.2d at 825-826. In a homicide case, there must be independent proof that the death occurred as the result of criminal agency in order to establish the corpus delicti. E.g., Schneider v. State, 152 So.2d 731 (Fla.1963) The State failed to prove this essential element in this case. Robinson's confession was improperly admitted into evidence, and this Court should reverse his conviction for a new trial.

The State sought to prove the criminal agency element of the corpus delicti via opinion testimony from the medical examiner. However, this attempt failed because the opinion itself was improperly based upon information from the confession. (R1152-1160) See, e.g., Hodges v. State, 176 So.2d 91,93 (Fla. 1965); Hester v. State, 310 So.2d 455,457 (Fla.2d DCA 1975). Dr. Cocoran found no evidence of injuries or trauma to the body. (R1130-1135) After reviewing the victim's medical records,

Cocoran used a process of elimination to conclude that the victim probably died from asphyxiation. (R1139-1140) He could not, however, eliminate death by natural causes. (R1135,1154-1159) In spite of this opinion, which was insufficient to establish death by criminal agency,[2] Cocoran was also allowed to testify, over objection, that the manner of death was homicide by asphyxiation. (R1152-1160) He based this conclusion on two factors: (1) the location of the body, and (2) a detective's report to him that the victim had been abducted. (R1159-1160) This opinion likewise failed to satisfy the independent proof of corpus delicti requirement because the report of an abduction was necessarily based upon Robinson's confession. Hodges, 176 So.2d 91; Hester, 310 So.2d 455. No other evidence of an abduction existed.[3]

Since the State failed to prove death occurred by criminal agency via evidence independent of Robinson's confession, the trial court erred in admitting the confession into evidence. Robinson's constitutional rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments have been violated. He urges this Court to grant him a new trial.

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[2] This fact distinguishes this case from Vaillancourt v. State, 288 So.2d 216 (Fla.1974) where the medical examiner could exclude natural causes of death through a process of elimination. Since Dr. Cocoran's opinion did not reach that conclusion, it does not establish the corpus delicti for a homicide.

[3] Robinson's statement was a confession and could not be characterized as an admission or res gestae statement which may be used to establish the corpus delicti. See, Nelson v. State, 372 So.2d 949 (Fla.2d DCA 1979); State v. Snowden, 345 So.2d 856 (Fla.1st DCA 1977).

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.

During the trial, the State introduced into evidence an edited version of Robinson's tape recorded confession. (R1211-1213)(State's Exhibit No. 39) The tape was played to the jury. (R1217-1238) Prior to the playing of the tape, the State was allowed, over defense objections, to distribute to the jurors copies of an unsigned, unauthenticated transcript of that tape recording. (R1211-1216,1217) The transcript was also introduced into evidence (R668,670)(State's Exhibit No. 41) and was delivered to the jury with the other items of evidence during its deliberations. (R1277-1278,1355-1356) However, the tape recording itself was not sent to the jury room. (R1277-1278) This transcript of the tape recorded confession was improperly admitted for two reasons: (1) Robinson had not signed the transcript or authenticated its accuracy; and (2) the transcript was not the best evidence of the confession.

Florida law states that a transcript of a defendant's oral confession cannot be admitted into evidence unless it is signed or read and adopted by the defendant. Middleton v. State, 426 So.2d 548,550 (Fla.1982); Marshall v. State, 339 So.2d 723 (Fla.1st DCA 1976); Williams v. State, 185 So.2d 718 (Fla.3d DCA 1966). Robinson did not sign, read, adopt or in any way authenticate the transcript introduced into evidence at his trial. (R1211-1238) He was prejudiced by the transcript's admission.

It was the only evidence of his confession available to the jury during its deliberations. (R668,670,1277-1278,1355-1356) Furthermore, his confession was the primary evidence against him in this case.

Even if Robinson had signed or authenticated the transcript, it was inadmissible because it was not the best evidence of the confession. See, Grimes v. State, 244 So.2d 130,134-135 (Fla.1971); Waddy v. State, 355 So.2d 477,478 (Fla.1st DCA 1978); Duggan v. State, 189 So.2d 890 (Fla.1st DCA 1966). The transcript was not merely used as an aid to understanding the tape recording. See, Golden v. State, 429 So.2d 45,50-55 (Fla.1st DCA 1983). It was improperly used and admitted as evidence of the confession and taken into the jury room during deliberations without the actual tape recording for comparison. (R1277-1278,1355-1356) Waddy, 355 So.2d at 478; Brady v. State, 178 So.2d 121 (Fla.2d DCA 1965).

The trial court's error in admitting the transcript of the tape recorded confession violated Robinson's rights guaranteed him under the Fifth, Sixth and Fourteenth Amendments. He asks this Court to reverse his case for a new trial.

ISSUE III.

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

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court of the United States held that the excusal for cause of prospective jurors who express conscientious or religious scruples against the death penalty violates a defendant's rights under the Sixth and Fourteenth Amendments to an impartial jury. That Court recognized that the State did have a legitimate interest in excluding such jurors if their beliefs would prevent them from deciding guilt or innocence or from considering death as a possible penalty. Ibid. at 522. However, the exclusion of jurors on any broader basis is constitutionally prohibited. Ibid. at 521-522, n.21. To balance these competing interests the Witherspoon court announced the following standard to be applied when the State seeks to excuse such jurors for cause:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt,...

Ibid. Two jurors excused for cause in this case, Helen Fiero and Arthur Saulino, did not meet this test. (R905-906)

A review of the voir dire of Helen Fiero quickly reveals that her position regarding the death penalty did not meet the

Witherspoon test for exclusion. At best, Fiero stated that recommending a death sentence might "bother" her (R886-887), or cause her "a little trouble," or present "a little problem." (R886)

> You are opposed to the death penalty? You are Mrs. Fiero?
>
> JUROR FIERO: Right.
>
> THE COURT: And the other gentleman?
>
> JUROR YOUMANS: Yes.
>
> THE COURT: Your name is Youmans?
>
> JUROR YOUMANS: Yes, sir.
>
> THE COURT: You three are opposed to the death penalty, is that correct?
>
> (All three jurors respond affirmatively.)
>
> * * *
>
> THE COURT: All right, let me ask you another question. This is the one I really want you to think about. Is your opposition to the death penalty--the principles that prompt your opposition to the death penalty, are they so strong as would prevent you from bringing back the death penalty in this case, regardless of what the facts were? If that facts warranted the death penalty, would your principles be so strong as to prevent you from bringing back the death penalty?
> [R789]
>
> * * *
>
> THE COURT: Miss Fiero, you, ma'am, the same question. Are your principles of such a strength as they would preclude you from bringing back the death penalty, regardless of what facts you heard?
>
> JUROR FIERO: Probably.
> [R790]
>
> * * *
>
> MR. LOUDERBACK: Okay, anybody else who has a problem?
>
> JUROR FIERO: I have a little trouble.
>
> MR. LOUDERBACK: You are Mrs. Fiero?

JUROR FIERO: Right.

MR. LOUDERBACK: What is the trouble you have?

JUROR FIERO: I can go along with the first vote. I mean, I would go by what--whether I felt guilty or not guilty. But if it sounds like it is going to be stated I recommend the death sentence, and I would have a little problem.

MR. LOUDERBACK: Well, maybe I can allay your fears somewhat. Individual jurors don't have to come out in court and say what their recommendation is, okay? There is a recommendation that says --

JUROR FIERO: I would know it.

MR. LOUDERBACK: Well, you would know it, yes.

JUROR FIERO: Yes.

MR. LOUDERBACK: Does that bother you?

JUROR FIERO: Yes.

MR. LOUDERBACK: You would be put in that position.

JUROR FIERO: Yes.

MR. LOUDERBACK: Obviously it is not easy to sit in any jury. But do you think you could be on this jury?

JUROR FIERO: Well, you know, I don't know how it would bother me at the time, and I don't--it sounds like it is stated exactly that way, that if he was found guilty, that I would be saying let's give the death sentence.

MR. LOUDERBACK: Well, no, that doesn't automatically follow. The choices, if there is a conviction, in the penalty phase is you come back and recommend either that the Judge impose a death sentence or the Judge impose a life sentence with twenty-five years before a person is elligible for parole. You recommend one or the other. The Judge is not bound by it. However, you don't come back and say I, Mrs. Fiero, recommend this or that.

JUROR FIERO: I understand that.

MR. LOUDERBACK: It's done collectively. Does that help you out any?

JUROR FIERO: Well, it remains about the same as far as I can see. I would have a problem. [Emphasis added.]

(R886-887)

Juror Fiero's beliefs were far from preventing her from considering death as a possible penalty. Any emotional involvement she might have had in making the decision is insufficient grounds for excusal. Adams v. Texas, 448 U.S. 38,48 (1980).

Arthur Saulino failed to make unmistakably clear that his views would have prevented him from considering death as a possible penalty. In fact during questioning by the court and prosecutor, Saulino clearly said that he could set his beliefs aside and follow the law. (R814,858-860) He admitted his opposition to the death penalty (R789) and the fact that he had "some hesitancy about the death penalty" (R814), but said that his beliefs would not prevent him from following the law and being fair in both the guilt and sentencing phases of the trial. (R814, 858-860)

THE COURT: All right, anybody else opposed to the death penalty? The gentleman on the end, Mr. Saulino?

JUROR SAULINO: Yes.

THE COURT: Are you opposed to the death penalty?

JUROR SAULINO: Yes, sir.

(R789)

* * *

MR. YOUNG: Okay, anybody else have a feeling about that? Mr. Saulino, you have indicated you had some hesitancy about the death penalty?

JUROR SAULINO: Yes.

MR. YOUNG: Would your hesitancy about the death penalty prevent you from sitting on the first part, the guilt part?

(Juror Saulino shaking head.)

MR. YOUNG: You have to answer out loud because she has to take it down. You feel you could be objective and fair on the first part?

JUROR SAULINO: Yes.
[Emphasis added.]

(R814)

* * *

MR. YOUNG: You did indicate, sir, that you were opposed to the death penalty?

JUROR SAULINO: Yes.

MR. YOUNG: But your beliefs weren't to the point where you couldn't sit here today and follow the law, is that correct?

JUROR SAULINO: I couldn't accept the death penalty.

MR. YOUNG: I'm sorry, I must have misunderstood what you said, you couldn't accept the death penalty? You understand now a little bit about the first and second part of the trial?

JUROR SAULINO: Yes.

MR. YOUNG: Given a situation, sir, where you found yourself back in the jury room on the first part, on the guilt phase, and you suddenly realize that I have got eleven other jurors here that are going to vote for guilty on murder in the first degree, the fact that knowing that, you would be looking at a penalty phase, would that prevent you from voting guilty of murder in the first degree?

JUROR SAULINO: It would bother me.

MR. YOUNG: I talk light of it. I understand that voting for guilty of murder in the first degree is not an easy decision, it's a serious

matter, it's something I can never relate to, I have never been through, but the whole case is serious and there has been a lot of thought put into it before we even get to this point. And frankly, if you told me it wouldn't bother you, I wouldn't have you on the jury. I understand it would bother you.

I guess my question is would it bother you to the point it would prevent you from following the law and being this fair, objective, impartial juror that we are looking for?

JUROR SAULINO: No, I don't think so.

MR. YOUNG: Now, let's go to the second part, sir. Given a situation that you are back in the jury again on the sentencing phase and the same situation, you are looking at eleven other jurors and you suddenly realize that maybe they are going to vote for the death penalty, how would you feel about your vote at that point, and assuming that based on all of the facts, that you feel the death penalty is warranted, do you understand what I'm saying?

JUROR SAULINO: Yes.

MR. YOUNG: Would that prevent you from following the law the Judge gives you at the end of the sentencing phase?

JUROR SAULINO: Well, I would be fair, but I prefer not to be on the jury.

MR. YOUNG: I understand that, Mr. Saulino. Let's go to the most basic question. Essentially it's one of the few duties as a citizen you have left in this country. Would you sit here today and perform your duty?

JUROR SAULINO: Yes.

MR. YOUNG: That is all we ask. Thank you very much, sir.
[Emphasis added]

(R858-860)

During defense counsel's questioning, Saulino appeared to change his mind and said that he "couldn't vote for [death]." (R883)

MR. LOUDERBACK: My notes indicate that you told Mr. Young that you felt you could--or you would not automatically vote not guilty because of your opposition or feelings about the death penalty, is that right?

JUROR SAULINO: I couldn't vote for the death penalty.

MR. LOUDERBACK: All right, let me ask you then, in the first part of the trial, are your feelings such that you would automatically refuse to find a person guilty because you know that that could expose him to the death penalty?

JUROR SAULINO: No.

MR. LOUDERBACK: You feel that as far as the first aspect, you could handle that aspect of it, correct?

JUROR SAULINO: Yes.

MR. LOUDERBACK: Okay, in the event that the case progressed beyond that to a sentencing phase, do you feel that you could vote for death if it were shown to be an appropriate case to you for death, or do you feel that death is never appropriate?

JUROR SAULINO: No, I couldn't vote for it.

MR. LOUDERBACK: You couldn't vote for it?

JUROR SAULINO: No.
[Emphasis added]

(R883) However, after further explanation of the sentencing procedures, Saulino said his feelings about his ability to sit as a juror were not changed. (R885)

MR. LOUDERBACK: Okay, Mr. Saulino, knowing the ultimate decision of sentence lies on Judge Bryson's shoulders, if Mr. Robinson was to be convicted of first degree murder, does that make things any different for you?

JUROR SAULINO: Well, I would have to vote first, wouldn't I?

MR. LOUDERBACK: Yes, it is required in every case there be a vote.

JUROR SAULINO: Yes.

MR. LOUDERBACK: But that sentence is merely advisory, it is not mandatory.

JUROR SAULINO: Then it would not be on my shoulders.

MR. LOUDERBACK: Okay, does that change perhaps your feelings about your ability to be a juror in this case?

JUROR SAULINO: No, no.
[Emphasis added]

(R885)

Neither Fiero nor Saulino qualified for exclusion under Witherspoon. Robinson asks this Court to reverse his death sentence which has been imposed in violation of the Sixth and Fourteenth Amendments.

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.

The trial court improperly applied Section 921.141, Florida Statutes in sentencing Amos Robinson to death. This misapplication of Florida's death penalty sentencing procedures renders Robinson's death sentence unconstitutional under the Eighth and Fourteenth Amendments. See, Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973). Specific misapplications are addressed separately in the remainder of this argument.

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.

In finding as an aggravating circumstance that the homicide was cold, calculated and premeditated (R622-623)(A6-7), the trial court was wrong for a number of reasons. First, the court employed an incorrect legal standard in concluding that the facts supported the circumstance. (R622-623)(A6-7) Second, the facts surrounding the crime do not prove the existence of this circumstance when the correct legal standard is employed. And, finally, the only evidence even suggesting the existence of this circumstance applies to Abron Scott, who actually killed the victim, and cannot be vicariously applied to Robinson.

This Court has held that the cold, calculated and premeditated aggravating circumstance requires proof of something more than premeditation alone; a greater level of premeditation is necessary. §921.141(5)(i), Fla.Stat.; Jent v. State, 408 So.2d 1024 (Fla.1981); Combs v. State, 403 So.2d 418 (Fla.1981). Furthermore, the circumstance is designed to reflect the mental state of the perpetrator. See, Mason v. State, 438 So.2d 374,379 (Fla. 1983). A reading of the trial court's findings in this case reveals that the judge labored under an erroneous interpretation of this legal standard (R622-623)(A6-7), and a reversal of Robinson's death sentence is required. See, Ferguson v. State, 417 So.2d 631 (Fla.1982); Ferguson v. State, 417 So.2d 639 (Fla.1982); Mines v. State, 390 So.2d 332 (Fla.1981). Initially, the court interpreted Jent to mean that proof of premeditation alone can be enough. Such a conclusion is corroborated by the court's own words[4/] and its use of the analysis in Spinkellink v. State, 313 So.2d 666 (Fla.1975) as an analogy to this case regarding the sufficiency of the proof for this aggravating circumstance. Spinkellink was decided long before the premeditation aggravating circumstance was added to the statute, see Combs, 403 So.2d at 420, and its discussion of the premeditation level for guilt is irrelevant to the premeditation level required by §921.141(5)(i). See,

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4/ In the findings of fact to support the death sentence, the judge stated:

> The Supreme Court in the case of Gent [sic] v. State, 408 So.2d 1024,1032 (Fla.1981) indicated that "cold, calculated...and without any pretense of moral or legal justification" are but "elements of the premeditation aggravating factor."

(R622)(A6)

e.g., Preston v. State, 444 So.2d 939,946 (Fla.1984). Moreover, the trial court found that factual circumstances attributable to Robinson's co-defendant, Abron Scott, somehow reflected Robinson's state of mind to be cold, calculating and without pretense of moral or legal justification. (R622-623)(A6-7) This was, at best, an improper, vicarious application of an aggravating circumstance upon Robinson based upon the acts of his co-defendant.

The facts surrounding this homicide simply do not support this aggravating circumstance. In finding this circumstance, the sentencing judge relied upon and stated the following facts:

> The short time outside the motel in Spinkellink was as deliberate as the reflection time that AMOS EARL ROBINSON had in riding to the scene of the murder, previous to the robbery, discussing it, and hearing the statement of co-defendant Abron Scott that "we ain't gonna leave this mother fucker alive." There was, in the mind of AMOS EARL ROBINSON, a premeditated, prearranged, preconceived and deliberately established plan and design to effect the death of Carlos Orellana. The Defendant had more than just a brief moment to form the conscious intent to kill.

(R622-623)(A6-7) Two operable facts emerge from the court's findings: (1) Robinson had time to reflect, and (2) Robinson heard his co-defendant express an intent to kill made during Scott's struggle with the victim on the scene. (R1260) These facts may have been sufficient proof for mere premeditation when coupled with Robinson's continuing to assist Scott after Scott killed the victim. However, these facts do not establish the heighten form of premeditation required for proof of the aggravating circumstance. E.g., White v. State, 446 So.2d 1031,1039 (Fla. 1984); Preston v. State, 444 So.2d at 946; Jent v. State, 408

So.2d at 1032. There was no evidence of a preconceived plan to kill; only a plan to rob existed. Consequently, Robinson's reflection time would not have included time to reflect on whether or not to commit murder. The first expression of an intent to kill was by Scott while he was struggling with the victim on the scene. (R1260) Furthermore, it was Scott, not Robinson, who actually carried out that expression of intent. (R1203) At best, Robinson had only a momentary reflection on whether or not to aid Scott in the killing, and in his confession, Robinson said that he never planned or intended to hurt anyone. (R1237)

This Court has rejected the finding of this aggravating circumstance in similar cases. For instance, Preston v. State, 444 So.2d 939 (Fla.1984), also involved a robbery, kidnapping and murder. The female victim was a convenience store clerk who was kidnapped after the defendant robbed the store. Her body was found nude in a field. She had suffered multiple stab wounds and lacerations almost resulting in decapitation. Although affirming the death sentence, this Court disapproved the cold, calculated and premeditated aggravating circumstance. The crime in this case shows no more of a heighten form of premeditation than the one in Preston.

In another robbery, kidnapping and murder case, this Court again found insufficient proof for the premeditation aggravating factor. Cannady v. State, 427 So.2d 723 (Fla.1983). The defendant in Cannady confessed to the police that he had robbed a Ramada Inn, kidnapped the night auditor, drove him to a remote wooded area and shot him. In his statement Cannady said that he

had not intended to kill the man. Robinson, too, said that he did not intend for anyone to be hurt. (R1237) Furthermore, he did not actually kill the victim in this case or express an intent that the victim be killed.

The cold, calculated and premeditated aggravating circumstance does not apply to Robinson. Its inclusion in the sentencing process has skewed the weighing of aggravating circumstances, and Robinson's death sentence has been unconstitutionally imposed.

B.

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

Section 921.141(5)(e), Florida Statutes provides for an aggravating circumstance where the evidence proves beyond a reasonable doubt that the homicide "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." The circumstance can be applicable even though the victim is not a law enforcement officer. Menendez v. State, 368 So.2d 1278 (Fla.1979); Riley v. State, 366 So.2d 19 (Fla.1979). However, in such cases, the proof must be strong and establish elimination of the victim as a witness as the sole or dominate motive for the homicide. Ibid. That level of proof does not exist in this case, and the trial court erred in finding this aggravating circumstance.

The trial court relied upon two facts to support this aggravating circumstance: (1) the victim was driven to an isolated area and killed after the robbery had already been effected; and (2) Abron Scott said, "We ain't leaving this mother fucker alive"

just before he killed the victim. (R619-620,1203,1206,1223-1224) (A3-4) However, both of these facts are susceptable to reasonable interpretations which do not support the hypothesis favoring the aggravating circumstance. See, Simmons v. State, 419 So.2d 316 (Fla.1982)(in order to establish an aggravating circumstance, circumstantial evidence of its existence must be inconsistent with any other reasonable hypothesis). There is no evidence that the victim was driven to an isolated area for the express purpose of killing him; no plan to kill existed. It is reasonable to assume that Scott and Robinson were planning to leave the unconscious victim in an isolated area merely to delay his reporting of the robbery. Neither Robinson nor Scott had weapons or used weapons. Furthermore, the first expression of an intent to kill was from Scott after he struggled and fought with the victim. (R1203,1206, 1223-1224) This expression and Scott's subsequent killing of the victim could have been a spontaneous reaction in the heat of passion caused by the confrontation. See, Armstrong v. State, 399 So.2d 953,963 (Fla.1981). Also, the fact that the body was hidden in the woods offers no support for the aggravating factor. Herzog v. State, 439 So.2d 1372,1379 (Fla.1983) The evidence simply does not provide the necessary strong proof that eliminating the victim as a witness was the dominate motive for the homicide. Menendez, 368 So.2d at 1282.

C.

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

In State v. Dixon, 283 So.2d 1 (Fla.1973), this Court defined the aggravating circumstance of especially heinous, atrocious or cruel as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Ibid. at 9. The trial judge found that the homicide in this case fit this definition and stated the facts supporting the finding in his order:

> Doctor Corcoran, an Assistant Pinellas County Medical Examiner, testified that the victim died of asphyxiation caused by his own automobile compressing his chest to the point where he could no longer expand his lungs. That for an individual to die in this fashion would take a minimum of a sixty second period of time. The victim, Carlos Orellana, knew just prior to being run over by his own automobile that he was about to become impaled upon or pinned underneath his own vehicle. After the vehicle had hit him and had landed on top of him, he then lay beneath the vehicle while the co-defendant Abron Scott, with AMOS EARL ROBINSON standing by and actively involved in this act, revved the engine and rocked the car back and forth in an attempt to get it out of the ruts in the sand into which it had become stuck. Therefore, not only did the victim have the pain and suffering of the automobile being on top of him, he also had the horrendous fright of having a running automobile engine stuck on the top of his chest. Further, being that the automobile had just been driven from Tampa, the engine compartment would have been very hot and would have burned the victim as he lay underneath the car. No individual on the face of this earth deserves to die in such a fashion, underneath his own automobile.

(R620-621)(A4-5) This finding is wrong and has tainted the sentencing process in this case.

The victim in this case died almost instantly. (R1265-1268) According to the trial court's findings, death occurred in about one minute. (R621)(A5) The medical examiner testified unconsciousness would have occurred in less than one minute. (R1267) This was not the type of homicide which produced the prolonged suffering of the victim. Contrary to the trial court's characterization (R622)(A6), this was not a slow death. It is not a crime qualifying for the heinous, atrocious or cruel aggravating circumstance. E.g., Simmons v. State, 419 So.2d 316 (Fla.1982); Cooper v. State, 336 So.2d 1133 (Fla.1976).

Not only was death quick, but the victim's awareness of impending death was also brief. The court noted that the victim "knew just prior to being run over by his own automobile that he was about to become impaled or pinned underneath his own vehicle." (Emphasis added) (R621)(A5) No evidence of extended mental anguish over impending death exists. Certainly, there is insufficient evidence of mental suffering to justify the heinous, atrocious or cruel circumstance. Teffeteller v. State, 439 So.2d 840 (Fla.1983).

Finally, the trial court relied upon facts to justify this circumstance which were irrelevant because the acts occurred after the death of the victim. See, e.g., Herzog v. State, 439 So.2d 1372 (Fla.1983); Blair v. State, 406 So.2d 1103 (Fla.1981); Halliwell v. State, 323 So.2d 557 (Fla.1975). The fact that the victim lay beneath the car which had become stuck in the sand was

one such fact. (R621)(A5) Another was the fact that the engine of the auto was revved while on top of the victim. (R621)(A5) And, third, the court improperly considered the fact that the car was rocked in an effort to free it from the sand while the victim was beneath it. (R621)(A5) Each of these factors were irrelevant considerations.

D.

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 And That His Capacity To Appreciate The Criminality Of His Conduct Or To Conform His Conduct To The Requirements Of Law Was Substantially Impaired.

At the time of the homicide, Robinson's mental and emotional capacities qualified for the mitigating circumstances provided for in Section 921.141(6)(b) and (f), Florida Statutes. Amos Robinson functions at the intelligence level of a 12 year old. (R1435) He has a full scale IQ of 74 and a learning capacity of a 7th grader. (R1418-1435) His personality and emotional development are retarded. (R1437) He is unable to understand human emotions and has a poor understanding of society's value system. (R1437) Dr. Merin testified that Robinson's emotional development appears to be that of someone raised in isolation without role models. (R1440) However, Merin did find that Robinson showed capacity for remorse and appeared capable of learning or gaining emotional development with adequate training and exposure to society's values. (R1440-1441) Robinson is also a passive personality and is easily lead by others who might be more aggressive. (R1439-1444) Furthermore, Merin concluded that

Robinson's ability to conform his conduct the law was limited, particularly if he were under the influence of a more dominate person. (R1442) Finally, facts compounding Robinson's mental and emotional capacities at the time of the crime were his drug and alcohol use and the dominate influence of Abron Scott. (See, Issue IV, E and F, infra.)

Borderline retardation and drugs or alcohol use at the time of a homicide supports a finding of the mitigating circumstances here at issue. In spite of the evidence that Robinson suffered these conditions at the time of the crime, the trial judge refused to even consider these mitigating circumstances. (R623-625)(A7-9) Nowhere in the sentencing order is Robinson's impaired mental capacity or emotional problems even mentioned. (R623-625) (A7-9) Moreover, the court specifically refused to consider whether or not the mitigating circumstances in §921.141(6)(b) and (f) existed. (R623)(A7) The court's refusal to consider the circumstances is corroborated by its refusal to instruct the jury on these factors. (See, Issue V, infra.)

It is apparent that the trial court must have employed an erroneous standard or procedure in concluding that the evidence of Robinson's condition should not be considered. See, Ferguson v. State, 417 So.2d 631 (Fla.1982); Ferguson v. State, 417 So.2d 639 (Fla.1982); Mines v. State, 390 So.2d 332 (Fla.1981). Consequently, Robinson's death sentence must be reversed for that reason. Ibid.; see, also Fitzpatrick v. State, 437 So.2d 1072,1078 (Fla.1983). Additionally, the Eighth and Fourteenth Amendments require that all evidence in mitigation be considered and weighed.

Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 969 (Fla.1978). And, in fact, the United States Supreme Court has specifically held that evidence of a defendant's mental impairment must be considered in the sentencing process. Eddings, 455 U.S. at 116.

The trial court erred in refusing to consider and weigh Robinson's impaired capacity and emotional disturbance as mitigating circumstances. Robinson's death sentence has been unconstitutionally imposed, and this Court must reverse it.

E.

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

Amos Robinson was 20 years old at the time of the crime (R624)(A8) and was suffering from impaired mental capacity and emotional problems. (See, Issue IV, D, supra.) As a justification for rejecting age as a mitigating factor under Section 921.141(6)(g), Florida Statutes, the trial court stated:

> B. This Court does further find that the mitigating circumstance of Florida Statute 921.141(6)(g) was not established by the evidence in that the Defendant was twenty years of age at the time that this crime was committed. Based upon the Defendant's prior criminal history and his knowledge of the criminal justice system and the results of the actions that he takes in breaking the laws of the State of Florida, the Defendant cannot be considered to be within that age specification that would allow for a mitigating factor as set out in the Florida Statutes.

(R624)(A8) The trial court erred, and Robinson urges this Court to reverse his death sentence.

The trial court simply failed to apply the correct legal standard in determining if Robinson's age should be mitigating.

There is no per se age qualifying or disqualifying for the circumstance. Peek v. State, 395 So.2d 492 (Fla.1981). Old age as well as youth can qualify. Agan v. State, 445 So.2d 326 (Fla.1983) And, the defendant's mental capacity or mental age must be considered and can render an age not normally deemed mitigating to be a valid mitigating circumstance. See, Meeks v. State, 339 So.2d 186 (Fla.1976); Meeks v. State, 336 So.2d 1142 (Fla.1976). The sentencing judge in this case failed to consider Robinson's impaired intellectual functioning and his mental age of 12 in evaluating the age mitigating factor. (R624)(A8)(See, Issue IV,D, supra.) Had the court applied the correct standard, Robinson's age, coupled with his intelligence and emotional level, would have qualified for this mitigating circumstance. Ibid.

F.

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.

Section 921.141(6)(d) and (e), Florida Statutes provide for mitigating circumstances in the following situations:

> (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
> (e) The defendant acted under extreme duress or under the substantial domination of another person.

Both of these circumstances apply to Robinson's participation in the homicide in this case.

Abron Scott was the primary and most dominate actor in this crime. While both Scott and Robinson planned the robbery,

it was Scott who first struck the victim. (R1202,1219-1222) Scott knocked the victim into his car, then to the ground. (R1202,1219-1222) He punched him and choked him before placing him in the back seat of the car. (R1202,1219-1222) Robinson did hit the victim 2 or 3 times but did not strike him again throughout the episode. (R1202-1203,1219-1222) It was Scott who drove the car to Gim Gong Road. (R1202,1221-1222) And, it was Scott who pulled the victim from the car, struggled with him, beat him, choked him and then ran over him with the automobile. (R1202-1203,1222-1224) It was also Scott who said, "We ain't leaving this mother fucker alive." (R1206) Even after the homicide, Scott continued to be the more dominate of the two. Scott had them walk to the nearby bar for help in freeing the car. (R1207-1208) He also stood in a manner so as to conceal the body from the men who helped them. (R1208)

In rejecting the circumstance that Robinson was under the substantial domination of Scott, the trial judge relied upon two factors: (1) that Robinson initially had the idea to run over the victim and was the first to try but was unsuccessful. (R624)(A8); and (2) that Abron Scott is of lesser intelligence than Robinson. (R624)(A8) However, reliance on these factors was misplaced. Robinson admitted he first tried to run over the victim while Scott held him. Evidence that it was Robinson's idea was conflicting. (R1203-1204,1219-1220,1223-1224) His recorded statement indicated "Abron...tried to get me to run over the man." (R1219-1220) Detective Halliday testified that Robinson made an unrecorded statement to the effect that it was his idea.

(R1578) Although Abron Scott has a lower IQ than Robinson (R1557), the question of who would be the more dominate cannot be answered by comparing intelligence. (R1439) Dr. Merin testified that a person of lower intelligence could dominate someone of higher intelligence if his personality type was the more aggressive. (R1439) Although psychologists examined both Robinson and Scott, neither psychologist examined both. (R1405-1406,1555-1556,1560) As a result no comparison of the two men's personalities was made in order to determine who was the more aggressive.

G.

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

Mitigating circumstances are not limited to those enumerated in Section 921.141, Florida Statutes. Songer v. State, 365 So.2d 969 (Fla.1978). The Eighth and Fourteenth Amendments mandate that all evidence in mitigation be considered and weighed against the evidence in aggravation. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The sentencing judge failed to comply with this constitutional requirement (R624-625)(A8-9), and Robinson's death sentence must be reversed.

Evidence of several valid nonstatutory mitigating circumstances exists in this case. First, Robinson's low intelligence level should have been considered even if the trial court did not deem that factor sufficient to justify a statutory circumstance. (See, Issue IV, D, supra.) See, Neary v. State, 384 So.2d 881, 886-887 (Fla.1980). Second, Robinson came from a broken home

and a deprived family background. (R1437) Scott v. State, 411 So.2d 866,869 (Fla.1982). Third, Robinson was an excellent and trusted employee. (R1513-1535) McCampbell v. State, 421 So.2d 1072,1075 (Fla.1982). Fourth, Robinson is capable of being rehabilitated. (R1440-1441) McCampbell, 421 So.2d at 1075; Simmons v. State, 419 So.2d 316,320 (Fla.1982). Fifth, Robinson demonstrated remorse. (R1393) Pope v. State, 441 So.2d 1073 (Fla.1984). Sixth, Robinson confessed and cooperated with the authorities. (R1196-1242) See, Washington v. State, 362 So.2d 658 (Fla.1978).

The trial court ignored or cursorily dismissed each of the above mentioned mitigating circumstances. (R624-625)(A8-9) Robinson's death sentence has been unconstitutionally imposed, and he urges this Court to reverse his sentence.

ISSUE V.

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

The trial court refused to instruct the jury on several of the mitigating circumstances enumerated in Section 921.141(6), Florida Statutes. (R1595-1599) Among them were: (1) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, §921.141 (6)(b); (2) that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor, §921.141(6)(d); and (3) 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, §921.141(6)(f). (R1595-1599,1653) These instructions were denied because the judge was of the opinion that the evidence did not support them. (R1595-1599) Failure to give these instructions usurped the jury's function to consider and weigh mitigating circumstances, and as a result, Robinson's death sentence was unconstitutionally imposed. Amends. V, VI, VIII, XIV, U.S. Const.; Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 856 (1978); Songer v. State, 365 So.2d 696 (Fla.1978); Cooper v. State, 336 So.2d 1133 (Fla.1976).

Due Process requires that the jury be instructed on all mitigating circumstances. Limiting instructions to those mitigating factors which the trial judge deems appropriate distorts the death penalty sentencing scheme:

> If the advisory function were to be limited initially because the jury could only con-

> sider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Cooper, 336 So.2d at 1140. The sentencing scheme was distorted in this case, and Robinson's death sentence should be reversed.

Apparently, the trial judge was attempting to follow the Florida Standard Jury Instructions when he refused to instruct on the mitigating circumstances. Notes to the trial judges in the standard instructions directs that instructions should be given only upon the aggravating and mitigating circumstances for which there is evidence. Before the aggravating circumstances instructions the following note appears:

> Give only those aggravating circumstances for which evidence has been presented.

Fla.Std.Jury Instr. (Crim.) Penalty Proceedings--Capital Cases at page 78. A similar note appears before the instructions on mitigating circumstances:

> Give only those mitigating circumstances for which evidence has been presented.

Fla.Std.Jury Inst. at 80. However, the trial court failed to properly follow these directions. Evidence existed on each of the mitigating circumstances for which instructions were denied. (See, Issue IV, D and F, supra.) The court improperly usurped the jury's function by denying these instructions. It was not within the trial judge's authority to instruct only upon those mitigating circumstances which he believed established. Just as a defendant has the right to a theory of defense instruction which

is supported by any evidence, e.g., Bryant v. State, 412 So.2d 347 (Fla.1982), he is also entitled to an instruction on mitigation circumstances supported by any evidence. A trial judge cannot substitute his opinion for that of the jury and deprive the defendant of the jury's consideration of the issue by denying jury instructions.

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.

During the penalty phase of the trial, the State presented the testimony of Dr. Linda Appenfeldt on rebuttal to the defense evidence in mitigation. (R1553-1567) Appenfeldt was the psychologist who had examined Robinson's co-defendant, Abron Scott. (R1553-1556) She had not examined Robinson. (R1564) Her testimony covered her psychological testing and evaluations of Scott and her conclusions regarding his intelligence and personality. (R1557-1559) The conclusions she reached were that Scott had an IQ of 50 and drug dependent, nonassertive personality. (R1557-1559)

The defense objected to Appenfeldt's testimony on relevancy grounds. (R1553-1555) There had been no defense evidence regarding Abron Scott. Testimony about Scott's IQ and personality was immaterial to the testimony presented about Robinson's IQ and personality traits. Furthermore, the fact that the defense asserted that Robinson could have been dominated by his co-defendant (See, Issue IV, F, supra) did not render Appenfeldt's testimony relevant. Dominance is not a function of IQ. (R1439,1561) Consequently, the fact that Scott's IQ is less than Robinson's is irrelevant. Moreover, both Scott and Robinson were characterized as passive personalities. (R1439-1442,1559) Appenfeldt was unable to testify which of the two was the more aggressive personality. (R1560-1561) Appenfeldt's testimony was simply too remote from the issues to be proper rebuttal evidence. See, Carter v. State, 332 So.2d 120,124 (Fla.2d DCA 1976).

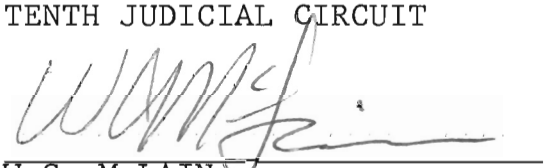
Introduction of Appenfeldt's testimony was not harmless. It invited the jury and the sentencing judge to draw comparisons between Robinson and Scott which were improper. A suggestion that Robinson could not be dominated by Scott because Scott was of lesser intelligence is unfounded and contrary to the psychologist's expert testimony. (R1439,1561) Indeed, the sentencing judge fell prey to this very suggestion. (R624)(A8)(See, Issue IV, F, supra.) Robinson's sentencing trial was tainted by this evidence, and his death sentence was unconstitutionally imposed. Amends V, VI, VIII, XIV, U.S. Const. He urges this Court to reverse his sentence for a new penalty phase trial before a new jury.

CONCLUSION

Upon the reasons and authorities presented in Issues I and II, Amos Robinson asks this Court to reverse his case for a new trial. For the reasons and authorities expressed in Issues III through VI, Robinson asks that his death sentence be reversed.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: 
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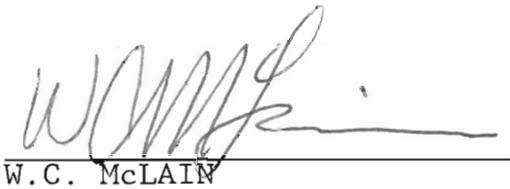
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 4th day of December, 1984.



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