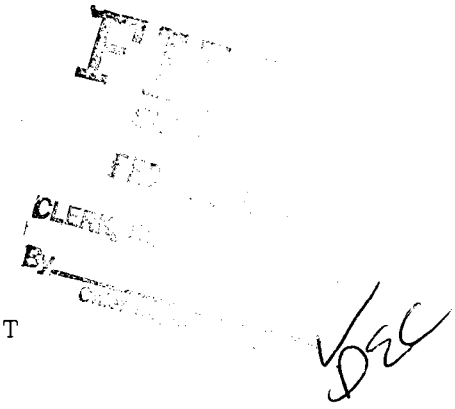

IN THE SUPREME COURT

of

THE STATE OF FLORIDA

ABRON SCOTT,
APPELLANT,

VS.

STATE OF FLORIDA,
APPELLEE.

CASE NO.
66,422

ON APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PINELLAS COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CITATIONS

I.

APPELLANT'S RESPONSE AND REPLY TO FIRST ISSUE ON APPEAL, TO WIT: WHETHER THE COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL.

Appellee cites Jennings v. State, 453 So. 2d 1109 (Fla. 1984) and Phillips v. State 476 So. 2nd 194 (Fla. 1985) for the proposition that mental anguish suffered by the victim is a factor to be considered when determining the existence of this aggravating circumstance. Jennings and Phillips, supra, are so factually dissimilar from the facts in the instant appeal that those cases are instructive only as to proposition aforementioned. Indeed, as conceded by Appellee, State v. Dixon, 283 So. 2d 1 (Fla. 1973) fully defines this aggravating circumstance and the mental anguish of the victim is but one part of that total definition or equation. One must recall that Dixon, supra, requires proof beyond a reasonable doubt of all aggravating circumstances.

Appellee claims that the crime in Delap v. State, 440 So. 2d 1242 (Fla. 1983), was heinous because:

> "...the victim was kidnapped and beaten." (Appellee's Brief p. 4)

In reality, the victim in Delap, supra, was not only

kidnapped and beaten, but she was observed struggling, pleading for her life and she was cruelly beaten and strangled throughout her abduction; see Delap, supra, p. 1257. The instant case is distinguishable because the victim was rendered unconscious at the onset of his abduction and it was not proved beyond a reasonable doubt that he was even conscious during his journey nor was this burden carried in regard to the extent of the victim's consciousness or even as to the existence of his vital life signs at the time that he was ultimately crushed beneath the Appellant's car.

Heiney v. State, 447 So. 2d 210 (Fla. 1984), and Thomas v. State, 456 So. 2d 454 (Fla. 1984), both cited by Appellee, are likewise factually distinguishable from the instant case. In Heiney, supra, the victim was savagely beaten with a claw hammer to the point that one eye ball exploded. Defensive wounds were observed. In Thomas, supra, the victim was so severely beaten that his skull was fractured in many places. He was thereby rendered unconscious and died after being comatose for several months. Appellant in Thomas, ibid p. 460, did not contest the finding of the heinous circumstance and although the Court reviewed and affirmed the existence of that circumstance, there are few facts recited in the opinion on this issue other than those above mentioned. Likewise in Preston v. State, 444 So. 2d 939 (Fla. 1984), the facts are

grossly dissimilar from those in the instant case, i.e. the victim was abducted and then stabbed multiple times such that she was nearly decapitated (ibid, p. 944).

Appellee's "summary" set forth in page 4 of her brief states that the victim was suffocated by being pinned under Appellant's car. Appellant reiterates that this claimed circumstance of suffocation was not proven in conformity with the mandate of Dixon, supra. In Parker v. State, 458 So. 2d 750 (Fla. 1984) cited by Appellee, the Court held that the "heinous" aggravating circumstance was not proven. In Lightbourne v. State, 438 So. 2d 380 (Fla. 1983), also cited by the Appellee, the crime was found to be heinous because the victim was executed after pleading for her life and after being sexually battered--circumstances totally dissimilar from the instant case.

Jackson v. State, 451 So. 2d 458 (Fla. 1984), may be distinguishable from the instant case as claimed by Appellee; nevertheless, that opinion's holding should be noted because the Court held the crime was not heinous because of the lack of evidence of conscious suffering to the extent contemplated by that aggravating circumstance. Please recall that Dixon, supra, p. 9, held that a crime is heinous only if the acts are such as to set the incident apart from the norm of capital felonies. Does proof that a man was beaten to death by fists, with no proof of defensive

wounds or pleas for mercy, or the extent of injuries satisfy this test?

II.

APPELLANT'S RESPONSE AND REPLY TO SECOND ISSUE ON APPEAL, TO WIT: WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CRIME WAS COLD AND CALCULATED.

Appellant's Initial Brief cited cases where abductions and multiple stab wounds were insufficient to prove the hightened premeditation necessary to support a finding of this aggravating circumstance, i.e. Mann v. State, 420 So. 2d 578 (Fla. 1982) and McCray v. State, 416 So. 2d 804 (Fla. 1982).

Appellee, by contrast, cites Combs v. State, 403 So. 2d 418 (Fla. 1981), Mason v. State, 438 So. 2d 374 (Fla. 1983), and Squires v. State, 450 So. 2d 208 (Fla. 1984) which affirmed findings of this circumstance. In Combs, Mason, and Squires, supra, the defendants each committed their crime while armed with a deadly weapon. Notwithstanding Appellee's claims to the contrary (See Appellee's Brief, p. 6), and the trial judge's findings to the contrary (R. 1857), there is no proof beyond a reasonable doubt that Appellant killed the victim with a deadly weapon, to wit; a car. Obviously, this aggravating circumstance must be evaluated on a case by case basis.

Appellant cites Peede v. State, 474 So. 2d 808 (Fla. 1985), Thomas v. State, 456 So. 2d 454 (Fla. 1984), and Kennedy v. State, 455 So. 2d 351 (Fla. 1984), for the proposition that Appellant's death sentence should be affirmed even if either or both of the challenged aggravating factors should be set aside.

In Peede, supra, the death sentence was affirmed because the Court knew that the trial court found that the one marginal mitigating circumstance was outweighed by the remaining valid aggravating circumstance. This is not the case at bar because the Appellant's mitigating circumstances (youth and mental infirmity) were not marginal or inconsequential, plus the trial court repeatedly emphasized that the victim was smothered beneath the car; obviously giving great weight to this circumstance in the total weighing process.

In Thomas, supra, the trial court erred in doubling up aggravating circumstances but the death sentence was affirmed because (1) the trial court was correct in giving little weight to the mitigating circumstances and (2) it was the defendant's second murder and (3) the valid aggravating factors outweighed the mitigating circumstances (no prior record; 20 year age) ibid p. 459-461). This Court cannot affirm the death sentence in this case on the authority of Thomas, supra, because the

aggravating-mitigating factors are clearly distinguishable.

The Appellee relies on Kennedy, supra, for the same proposition, i.e. that this cause need not be remanded for resentencing without a jury if one or more aggravating factors are disallowed. Again, Appellee's reliance is misplaced. The defendant in Thomas, supra, had but a single mitigating factor (extreme duress) (ibid p. 354) and multiple aggravating factors including the fact that the defendant had previously been convicted of a capital felony!

In conclusion, should this Court disallow one or both challenged aggravating factors, this cause should be remanded for resentencing by the trial judge so that the latter can re-weigh the valid aggravating and mitigating circumstances or in the alternative, this Court should summarily impose a life sentence without parole.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Ann Garrison Paschall, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammel Bldg, Tampa, Florida 33602 by US mail on this 11 day of February, 1986.

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