IN THE SUPREME COURT OF FLORIDA

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MICHAEL L. ROBINSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 85,605

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

MICHAEL L. ROBINSON, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NUMBER 85,605

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In referring to the record on appeal, the following symbols will be used:

(R) The record on appeal consisting of four volumes: Volume I - transcript of plea proceedings; Volume II - transcript of penalty proceedings; Volume III - transcript of sentencing; and Volume IV - pleadings;

(SR) The supplemental record consisting of: Volume I - transcript of video arraignment; Volume II - transcript of October 12, 1995 motion hearing; and Volume III - transcript of October 4, 1995 motion hearing.

STATEMENT OF THE CASE AND FACTS

On August 22, 1994, the Spring Term Grand Jury of the Ninth Judicial Circuit, Orange County, Florida, indicted Michael Lee Robinson for the premeditated murder of Jane Silvia. (R115-16)

On September 26, 1994, Appellant filed a Motion to Retain Experts for Mental Status Examination of the Defendant. (R135-36) Counsel referred to information that indicated a necessity to determine whether Robinson suffered from organic brain damage and/or other mental problems. (R135) The trial court granted Appellant's motion. (R137)

Appellant filed numerous pretrial motions which subsequently became moot when Robinson decided to plead guilty, waive a jury, and request the death penalty.[1] On January 23, 1995, the Appellant withdrew his previous plea of not guilty and tendered a plea of guilty as charged to first-degree murder. (R1-39,225-27) As a precautionary measure, the trial court ordered a second psychiatric examination by Dr. Kirkland.[2] (R2-5,244-45)

Prior to the plea colloquy, Appellant's counsel explained that Michael Robinson did not wish to proceed to trial, did not wish to present any defense, did not want his lawyers to file any

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[1] Actually, Robinson decided shortly after his arrest that he deserved to die for the murder of his friend. (R237-38) Early in the proceedings, the lawyers indicated that Robinson would probably be seeking the death penalty in this case. (SR25-27)

[2] Prior to entering the guilty plea, defense counsel requested a second psychiatric evaluation, making the plea "contingent upon that just to cover all of our posteriors." (R2)

motions on his behalf, and did not want to present any mitigation at the penalty phase. Michael Robinson wanted to die and was "seeking the death penalty in this case." (R6) Defense counsel maintained that certain defenses could be raised and that this case is "not necessarily a death penalty case." (R6) Defense counsel believed there were a number of ways they could assist Robinson. However, Robinson did not want any help and asked to die. (R7)

The trial court conducted a plea colloquy. (R8-18) The State set forth a factual basis on the record. (R18-22) On July 25, 1994, Jane Silvia (Robinson's girlfriend) did not report for work. An investigation revealed Michael Robinson to be a suspect. Under police questioning, Robinson initially told detectives that five drug dealers had entered the apartment he shared with Silvia and murdered her. On August 16, Robinson contacted Detective Griffin and admitted his guilt. Robinson explained that several days before the murder, he stole Silvia's VCR, television, and microwave and traded them for drugs. (R18-19) Silvia had reported the theft to police but did not press charges at the time. (R13) Silvia hoped that Robinson would return her property and everything would work out. Police said that she had seven days to call back and initiate charges. (R13, 228-40; State Exhibit Nos. 1 and 2) The couple attempted to retrieve the property but it had already been sold. (R19)

After their futile attempt to retrieve Silvia's property, the couple returned to the apartment, Jane Silvia went to sleep

on the couch. Robinson went out to his truck and got a drywall hammer. Robinson returned to the apartment and watched Silvia sleep, thinking about what he was going to do. Robinson then hit Silvia in the head with the hammer as she slept. The hammer went through Silvia's skull. (R19-20) Robinson hit her a second time. He then hit her a third time using the claw end of the hammer. (R20) In an effort to stop her heart, Robinson stabbed Silvia through the neck with a knife. (R20) Robinson then left the apartment and went to Cocoa Beach. He returned later, retrieved the body, and buried it near Apopka Boulevard in Orange County. (R20) The autopsy revealed that Silvia died as a result of skull fractures and brain injury due to blunt force trauma to the head. (R20-21) At the deposition, the medical examiner concluded that the first blow would have rendered Silvia unconscious and she undoubtedly suffered no pain. (R22)

On March 30, 1995, the trial court conducted a penalty phase without a jury. (R40-101) The State called Detective Griffin as their sole witness. (R46-69) Griffin played the taped interview of Michael Robinson in which Robinson admitted to killing Jane Silvia as set forth in the State's factual basis at the plea colloquy. (R51-67,228-40) Robinson told Detective Griffin that he loved Jane very much and that he deserved the death penalty for killing her. (R63-64) In an addendum to the interview, Robinson explained that his own mother had sent them some money to retrieve Silvia's electronic equipment. (R65) Silvia was keeping the money in her shoes for safekeeping. Robinson

gratuitously told Detective Griffin:

> ...So that was one of the reasons that I killed her, was to retrieve that money from her. I didn't want to go through any physical battle with her and have her call the police.

(R65) Robinson added that the "other reason" was to prevent Silvia from calling the police to press charges on the theft of her electronic equipment. (R65-66)

Relying on Koon v. Dugger[3] defense counsel "proffered" mitigating evidence which they had received primarily through Dr. Berland's report and Mr. Robinson's mother. (R70-72) Defense counsel expressed a belief that they could present evidence that Robinson was under an extreme emotional disturbance due to the loss of his job. Additionally, Robinson suffered from cocaine addiction and harbored a great fear that he would return to prison as a result of the theft he committed. (R71) Defense counsel also stated they could present evidence of Robinson's excellent behavior in jail, his cooperation with police, and lifelong substance abuse. (R71) Additionally, although sane at the time of the offense and competent to proceed, Robinson did suffer from mental illness. (R71-72) Defense counsel stated that they also would have presented **significant testimony** from Dr. Berland regarding Robinson's organic brain damage which originated at birth. Robinson suffered oxygen deprivation due to a very difficult delivery. (R74) Additionally, there were a number of incidents, including an automobile accident, a bicycle

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[3] Koon v. Dugger, 619 So.2d 246 (Fla. 1993).

accident, and a construction accident resulting in significant brain injury. (R74) Dr. Berland also expressed many concerns about Robinson's emotional health. (R74-75)

The court inquired and Mr. Robinson reiterated his desire to waive all potential mitigation. (R72) Additionally, Robinson expressed concern that the psychological evaluations mentioned his organic brain damage. (R72) Robinson attempted to minimize this evidence by pointing out that the doctors found him to be sane and competent to stand trial. (R72-73)

The defense ultimately entered both Dr. Berland's and Dr. Kirkland's reports into evidence. (R75-76) Defense counsel told the trial court that Dr. Berland was available by telephone if the court had any questions as a result of the limited proffer.[4] (R75-76) At the conclusion of the defense proffer, Robinson reiterated:

> THE DEFENDANT: Your Honor, I just want to make it clear, I don't want any mitigators considered by the court.
>
> THE COURT: I understand you.
>
> THE DEFENDANT: Thank you, ma'am.
>
> THE COURT: For the record, I would say that you appear to be well groomed and well spoken and focused. I've never seen anyone quite so determined to die in the electric chair but you appear to have your mind set and nothing about your appearance would make me believe that you're not competent.

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[4] Robinson had personally requested that Dr. Berland not appear at trial. (R76)

THE DEFENDANT: Thank you, Your Honor.

(R76)

After the State's closing argument, defense counsel indicated that, if allowed by Mr. Robinson, counsel would have presented evidence and argument contesting all three of the aggravating circumstances urged by the State. (R92) Then, at counsel's prompting, Robinson expressed his desire to stipulate that the aggravating circumstances be found by the court beyond a reasonable doubt. (R93)

The State then presented brief testimony from the victim's brother who told the court that Robinson had "destroyed my family." (R95) The brother also told the trial court how proud Jane Silvia would have been if she had lived to see her son graduate high school. (R95-96) The family asked the judge to "take care of business for us, please." (R95)

On April 12, 1995, the trial court sentenced Michael Robinson to die in Florida's electric chair. (R102-109) The court rendered a sentencing order finding three aggravating circumstances: (1) witness elimination; (2) pecuniary gain; and (3) heightened premeditation. (R257-60) The trial court referred to the proffered mitigating factors and, "as requested by the Defendant, the Court has not considered the mitigators." (R261) The court concluded that the aggravating circumstances would not have been outweighed by any potential mitigating circumstances and granted Michael Robinson's death wish. (R261-62) Appellant filed a Notice of Appeal on April 12, 1995.

(R265) This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

SUMMARY OF THE ARGUMENT

The trial court improperly sentenced Robinson to death. At the Defendant's request, the trial court improperly agreed to ignore substantial, valid, uncontroverted mitigating evidence. Farr v. State, 621 So.2d 1368 (Fla. 1993) controls. Mitigating evidence must be considered and weighed when contained **anywhere** on the record, to the extent that it is believable and uncontroverted. This dictate applies with no less force when the defendant argues in favor of the death penalty, even when the defendant asks the trial court not to consider mitigating evidence. Robinson's record is full of substantial, valid mitigating evidence.

Appellant also contends that the State failed to prove the three aggravating circumstances beyond a reasonable doubt. Robinson was seeking a death sentence in this case. Therefore, his self-serving confession lacks credibility on this issue.

The State's evidence did not prove beyond a reasonable doubt that Robinson committed the murder for pecuniary gain. Robinson had as much right to the money as the victim. Robinson's own mother sent the money to the couple. They both had dominion and control of the funds. Furthermore, Robinson took the money as an afterthought following the murder. Robinson did not commit the murder in order to accomplish the theft.

The State also failed to prove the requisite "heightened premeditation." Robinson was a brain-damaged crack addict who was involved in a relationship with the victim. He was confused,

scared, and emotional. He feared a return to prison. His actions prior to the murder are just as consistent with a man vacillating rather than coolly contemplating.

The victim was not a law enforcement officer. In such cases, the State must prove that the primary or dominant motive for the murder was to eliminate a witness. The State failed to meet the requisite burden of proof in this case.

Finally, this Court should recede from Hamblen v. State, 527 So.2d 800 (Fla. 1988). The trial court allowed Robinson to waive the presentation of mitigating evidence. Hamblen approves such a process. The trial court need not appoint special counsel to present evidence and argument for a life sentence. The requirements placed on the trial court and this Court to examine the mitigation in order to ensure the fair application of death sentences is inconsistent with the Hamblen holding. If mitigating evidence is not presented, the trial court and this Court cannot discharge their duties to review the propriety of the death sentence.

ARGUMENT

Michael Robinson discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentence. Each issue is predicated on the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

THE TRIAL COURT FAILED TO FOLLOW THIS COURT'S DICTATE IN FARR V. STATE[5] AND AFFIRMATIVELY IGNORED VALID MITIGATION RENDERING ROBINSON'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE CONSTITUTION OF FLORIDA.

Early in the proceedings, Michael Lee Robinson made it abundantly clear that he wanted to be executed for his crime. One week after his arrest, against the advice of counsel, Robinson gave a full confession and told Detective Griffin that "the electric chair is, you know, what I would like to be given as punishment." (R238) More than three months before the guilty plea, defense counsel advised the court that Robinson has a "desire to have the death penalty imposed and he makes no bones about that." (SR27) Although no one appeared to question Robinson's mental state, all parties seemed very concerned that

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[5] Farr v. State, 621 So.2d 1368 (Fla. 1993).

Robinson's competency to proceed should be clearly established on the record. (SR22-32; R2-5) Robinson voluntarily entered a plea of guilty as charged and asked the trial court to sentence him to death. (R1-39) Robinson also waived a jury for the penalty phase and instructed his lawyers not to present any evidence in mitigation. (R23-26,32-33,40-44) Robinson had spent time in prison and said would rather die than spend the rest of his life incarcerated. (R14-15) The parties below seemed to be aware of this Court's pronouncement in Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993). However, it is abundantly clear that the parties had no knowledge of this Court's decision in Farr v. State, 621 So.2d 1368 (Fla. 1993).

To facilitate appellate review in these type of cases, this Court established the following procedure:

> Although we find no error occurred here, we are concerned with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. Accordingly, we establish the following prospective rule to be applied in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Koon v. Dugger, 619 So.2d at 250. The parties below did follow the procedure set forth above.

Unfortunately, the trial court was under the mistaken impression that she was **obligated** to **ignore valid mitigating evidence**. The trial court was not completely to blame for this error. Both defense counsel and the prosecutor erroneously advised the trial court that the court **must not** consider valid mitigation.

> MR. IRWIN (DEFENSE COUNSEL): ...we are basically required to proffer to the court...mitigators, statutory or non-statutory...and we can make his voluntary understanding waiver possible on the record.
>
> THE COURT: And then if he waives that, <u>then I am to ignore that</u>?
>
> THE DEFENDANT: Right.
>
> THE COURT: <u>I've got to forget that</u>.
>
> MR. ASHTON (PROSECUTOR): I think we may have a legal issue here. My reading of the case is that simply the attorneys proffer the area. I don't think it was intended that an entire evidentiary hearing by way of proffer be made <u>because the court has to ignore it</u>...

(R33-34) (emphasis added)

At the subsequent penalty phase, defense counsel proffered the areas of mitigating evidence that they would have explored and presented to the court if allowed by Mr. Robinson. (R70-76) At the conclusion of the proffer, the Defendant told the court:

> THE DEFENDANT: Your Honor, I just want to make it clear, I don't want any

mitigators considered by the court.

> THE COURT: I understand you.
>
> THE DEFENDANT: Thank you, ma'am.
>
> THE COURT: For the record, I would say that you appear to be well groomed and well spoken and focused. I've never seen anyone quite so determined to die in the electric chair but you appear to have your mind set and nothing about your appearance would make me believe that you're not competent.
>
> THE DEFENDANT: Thank you, Your Honor.

(R76) After the state argued in favor of three aggravating circumstances, defense counsel proffered that, if permitted by the Defendant, counsel would have argued against all of the aggravating circumstances urged by the State. (R92) Mr. Robinson then stipulated that the evidence supported the aggravating circumstances and asked the trial court to find them beyond a reasonable doubt. (R93)

In sentencing Robinson to death, the trial court stated that it had "very carefully considered and weighed the aggravating circumstances and satisfied itself that any potential mitigating circumstances proffered would not have affected the life or death decision in this case..." (R106) In its sentencing order, the trial court stated that it had reviewed the presentence investigation report. (R256) However, the trial court focused mostly on the procedural history of the case, specifically Robinson's insistence that his lawyers refrain from presenting any mitigating evidence. (R255-56) The trial court then

concluded that the State had proved three aggravating circumstances beyond a reasonable doubt. (R257-60) In dealing with the **potential** mitigating factors, the trial court wrote:

> THIS COURT HEARD THE PROFFER presented by the attorneys for the Defendant of mitigators they **would have** presented if the Defendant had permitted. The Defendant confirmed this desire on the record repeatedly. Their statutory and non-statutory mitigators would have been that the defendant was in an extreme emotional state at the time of the offense, that he suffered from cocaine addiction, that he was afraid he'd go to prison, that he'd lost his job, he had a good jail record, he cooperated with the detectives and took them to the crime scene, that he suffered from mental defects according to Dr. Kirkland and Dr. Berland, and that he was remorseful.
>
> Of greatest concern to this Court was Michael Robinson's competency and history of mental health. The Defendant did allow the reports of Doctors Kirkland and Berland into evidence for consideration. Although he has had some head injuries and **possible** genetic mental illness, **nothing** about the Defendant today or the date of the murder or the date of the plea indicates he is not competent to participate in these court proceedings or that he was not totally aware of what he was doing at the time of the offense or the ramifications of those actions. He is well above average intelligence.
>
> As to his other mitigators, there is evidence that the Defendant was afraid he'd go to prison, but that is not something that rises to a mitigator in this case. He did cooperate with the detectives but only after his first statement proved untrue. There is some evidence he had a cocaine problem since the state's evidence is that he traded the victim's property for cocaine.

> There is no evidence at all that the other proffered mitigators exist; and, as requested by the Defendant, the Court has not considered the mitigators.

(R260-61) (Bolded emphasis in original, underlined emphasis supplied)

The trial court **clearly** erred when, at the request of the Defendant, the court declined to consider the mitigating evidence. The trial court plainly states in its written findings of fact, "...as requested by the Defendant, the Court has not considered the mitigators." (R261) The trial court took this tack despite the existence of valid mitigating evidence. The trial court's deliberate disregard of substantial, valid mitigating evidence flies in the face of this Court's holding in Farr v. State, 621 So.2d 1368 (Fla. 1993).

In Hamblen v. State, 527 So.2d 800 (Fla. 1988), this Court pointed out that:

> The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.
>
> In this case, the trial judge made a thoughtful analysis of the facts. Especially telling was his disagreement with the prosecutor that the killing was heinous, atrocious, or cruel. The judge did not merely rubber-stamp the state's position. He also carefully analyzed the possible statutory and non-statutory mitigating evidence.
>
> * * *

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

Hamblen, 527 So.2d at 804.

In contrast, Robinson's trial court merely rubber-stamped the State's position on the aggravating circumstances. The trial court allowed the Defendant to **stipulate** that the State had proved the aggravating circumstances beyond a reasonable doubt. Additionally, Robinson's trial judge dutifully granted Robinson's request to ignore valid mitigating evidence.

In Pettit v. State, 591 So.2d 618 (Fla. 1992), the trial court took judicial notice of a prior competency hearing and of the mental health experts' testimony and report. The court also asked to hear the testimony of two neurologists. This Court reiterated its holding in Hamblen but again emphasized that:

> ...the trial judge must carefully analyze the possible statutory and nonstatutory mitigating factors against the aggravators to assure that death is appropriate.... The trial judge performed this task in this case. He was particularly concerned with the effect of Pettit's having a condition known as Huntington's chorea. He required Pettit's examination by physicians and required their testimony...for the presence of mitigating circumstances. He received the testimony of Pettit's grandfather in reference to the devastating and progressively deteriorating effect that Huntington's chorea has on a person. The trial judge also received a

> presentence investigation report....[B]y his treatment of Pettit's physical condition and by allowing the testimony of the grandfather, the judge fully understood the requirement of considering, and did consider, nonstatutory mitigating evidence.

Pettit, 591 So.2d at 620.

In Clark v. State, 613 So.2d 412, 414 (Fla. 1992), the trial court:

> ...considered the mitigating evidence, including the psychiatric reports as noted in the sentencing order. The trial court conscientiously performed its duty and decided that no mitigators had been established...The record contains competent, substantial evidence supporting the court's conclusion that Clark's death sentence is appropriate.

In Henry v. State, 586 So.2d 1033 (Fla. 1991), the defendant waived mitigation following a full and complete guilt phase trial. The Henry trial court found one statutory mitigating factor (no prior criminal history) and one nonstatutory factor (Henry's service in the Marine Corps.) The trial court conducted a penalty phase trial with a jury and heard argument and evidence.

> ...As in Hamblen, the instant trial court carefully and conscientiously considered this case, as evidenced by the finding of two mitigators in spite of Henry's refusal to allow presentation of more testimony.

Henry, 586 So.2d at 1037-38.

In Durocher v. State, 604 So.2d 810 (Fla. 1992), this Court rejected Durocher's argument that the judge's findings regarding mitigating evidence were not clear.

> ...We find no merit to these arguments. The trial judge carefully considered and weighed all of the evidence about Durocher that could be gleaned from his statements, from the reports of the mental health experts who examined Durocher prior to trial and prior to his change of plea, and from counsel's statement in court. [citation omitted] The trial judge conscientiously performed his duty of deciding whether mitigators had been established by the evidence and resolved conflicts in that evidence.

Durocher, 604 So.2d at 812.

In Lockhart v. State, 655 So.2d 69 (Fla. 1995), the trial court refused the defendant's request to sentence him without empaneling a jury for the penalty phase. Although the Lockhart court did not find any mitigation, the sentencing order "reflects that the trial judge...apparently read the newspaper articles in an attempt to find something in mitigation." Lockhart, 655 So.2d at 74. This Court pointed out that the Lockhart trial judge "carefully analyzed the possible statutory and nonstatutory mitigating evidence." Id. quoting Hamblen v. State, 527 So.2d 800 (Fla. 1988). "Where a judge thoughtfully analyzes facts and does not merely rubber stamp the State's position, see Hamblen, 527 So.2d at 804, we do not believe that independent counsel must be appointed." Id.

Unfortunately, Robinson's trial judge chose to rubber-stamp the State's position in contravention of Hamblen. Even though Robinson prevented his lawyers from presenting evidence in mitigation, valid mitigation is clearly apparent on the record. This Court has repeatedly stated that mitigating evidence **must** be

considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So.2d 160 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987). "That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993).

Farr also pleaded guilty and requested that the prosecutor ask for the death penalty. Like Robinson, Farr also explained that he wanted to die. Like Robinson, Farr waived his right to a penalty phase jury. As in Farr's case, Robinson's record on appeal contains a psychiatric report (actually two reports) and a presentence investigation report. The Farr trial court at least considered Farr's intoxication at the time of the murder, but found it not to be of mitigating value. Farr, 621 So.2d at 1369. Just like Robinson's trial court, Farr's trial judge ignored the mitigating evidence contained in the presentence report and the psychiatric report.

The record on appeal in this case contains valid, substantial, and uncontroverted mitigating evidence. The court asked for Dr. Kirkland's psychiatric examination **only** to corroborate that Robinson was competent to proceed. As such, Dr. Kirkland did not attempt to develop any mitigating evidence. Even so, Kirkland's report reveals that Robinson has a "lengthy history of abuse of alcohol and other drugs." (Defense Exhibit

No. 1)

Dr. Berland's report reveals more extensive mitigating evidence. Berland found evidence of a "chronic psychotic disturbance involving thought disorder (esp. delusional paranoid thinking) and mood disturbance (esp. disturbance of manic nature)." (Defense Exhibit No. 1) Berland also found evidence of some antisocial character disturbance that was mediated by Robinson's manic disturbance. Berland also found "significant, bilateral (in both hemispheres) cerebral cortical impairment." Despite Robinson's "significant evidence of impairment, the defendant's overall intellectual ability... plac[ed] him in the superior range of intelligence." Id.

Berland noted Robinson's "extensive history of incidents" which "contributed to impairment from brain injury." During the proffer, defense counsel mentioned that Dr. Berland would have been the source of significant testimony regarding Robinson's mental trauma, i.e., his organic brain damage. (R74) Robinson's troubles began at birth due to a very difficult delivery which resulted in oxygen deprivation. (R74) Additionally, during the course of his life, Robinson suffered additional brain damage during an automobile accident, a bicycle accident, and a construction accident. (R74) Additionally, Berland reported that Robinson received high dosages of Ritalin from ages six to nine. (Defense Exhibit No. 1)

Berland also found evidence of "delusional paranoid thinking, tactile and auditory perceptual disturbances, and

significant episodes of depression and manic disturbances." Dr. Berland also spoke to Robinson's mother who corroborated the events which contributed to Robinson's brain damage. She also provided details of his "lifelong history of apparent mental health problems." She recounted behavior throughout Robinson's life that suggested the presence of "delusional paranoid thinking, manic and depressive mood disturbance, and perceptual disturbance (particularly auditory hallucinations)." Id. She also reported a history of mental illness and psychiatric hospitalizations throughout Robinson's family (both paternal and maternal). From this fact, Berland opined that Robinson's problems were of genetic origin, though their intensity may have been supplemented by brain injury.

Other valid, substantial, uncontroverted mitigating evidence is apparent from the record. The most glaring factor is Michael Robinson's extreme remorse. Robinson's confession to Detective Griffin, his plea of guilty, and his desire to die reveal that **Michael Robinson is dripping with remorse.** Robinson apologized to the victim's brother after entering his guilty plea. (R37-38) He apologized again at the conclusion of the penalty phase. (R97) Throughout the proceedings, he reiterated that he deserved to die for what he did. After the trial judge finally granted his wish and sentenced him to death, Robinson added:

> THE DEFENDANT: One statement after the fact, Your Honor.
>
> I would like to say that this whole thing has been because of drugs throughout my entire life and has led up to

> this incident and that I am truly sorry for the family for what's happened.
>
> I know that's not enough.
>
> That's why I asked for the death penalty.

(R108) The record makes it abundantly clear that Robinson's remorse is sincere and his quest to die is very real.[6]

The trial court's findings of fact recite the eight mitigating circumstances proffered by defense counsel at the penalty phase. (R260-61) Robinson was (1) in an extreme emotional state at the time, (2) cocaine addiction, (3) he was afraid he'd return to prison, (4) he'd lost his job, (5) good jail record, (6) cooperation with police, (7) mental defects, and (8) remorse. (R260-61) The trial court reiterates that, although Robinson suffered from head injuries and possible genetic mental illness, he is above average intelligence and is competent to participate in these court proceedings. (R261) It is abundantly clear from this statement that the trial court is focusing solely on Robinson's sanity at the time of the murder and competence to proceed. Such a consideration is completely separate and apart from potential mental mitigating evidence. See, e.g., Knowles v. State, 632 So.2d 62 (Fla. 1993) (rejection of insanity and voluntary intoxication defenses does not preclude finding mental mitigation).

In addressing the other mitigators, the trial court

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[6] In fact, if the trial court and/or this Court really wanted to punish Michael Robinson, his sentence should be life imprisonment.

concludes that Robinson's fear that he would return to prison "is not something that rises to a mitigator in this case." (R261) The trial court concedes that Robinson cooperated with police after his first statement proved untrue. (R261) The trial court also acknowledges Robinson's cocaine problem. (R261) The court concludes that there is no evidence at all that the other proffered mitigators exist. (R261) The court's final conclusion is simply erroneous. Robinson's confession reveals his extreme emotional state at the time he committed the murder. Additionally, the trial court's act of ignoring Robinson's **extreme remorse** is simply unfathomable. The trial court removes all doubt when it assures the Defendant and this Court that, "as requested by the Defendant, the Court has not considered the mitigators." (R261)

Although the trial court claimed to have reviewed Robinson's presentence investigation report, the court refers to none of the substantial, valid, uncontroverted mitigation contained therein. Although this Court provided copies of the sealed presentence investigation report to counsel, this Court denied Appellant's motion to unseal the report. Therefore, counsel is uncomfortable reciting any of the pertinent information contained in the report with any specificity in this public record Initial Brief. Nevertheless, counsel urges this Court to review the sealed report and view the plethora of substantial, valid mitigating evidence contained therein. The report adds to the list of non-statutory mitigating factors that the trial court ignored. The

report also arguably supports the statutory mitigating factor of no significant prior criminal history. Additionally, the information in the report corroborates and further details Robinson's difficult family history and substantial brain damage.

Although the trial court understood this Court's pronouncement in Koon v. Dugger, the prosecutor and defense counsel neglected to inform the trial court of this Court's decision in Farr v. State, 621 So.2d 1368 (Fla. 1993). In fact, the lawyers erroneously led the trial court to believe that it must ignore substantial, valid mitigating evidence. This Court's Farr opinion clearly stands for the proposition that the trial court erred in acceding to Robinson's demands and ignoring the vast quantity of mitigation. Even though the Farr trial judge considered the defendant's intoxication, this Court reversed Farr's death sentence for a new penalty phase due to the trial court's failure to consider **all** of the available mitigating evidence.[7] Michael Robinson's case is indistinguishable from Farr v. State, 621 So.2d 1368 (Fla. 1993). This Court must vacate Robinson's death sentence and remand for a new penalty phase where the trial court must weigh all available mitigating evidence against the aggravating factors.

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[7] Farr's record contained a psychiatric report and presentence investigation report containing information about Farr's troubled childhood, numerous suicide attempts, the murder of his mother, psychological disorders resulting in hospitalization, sexual abuse suffered as a child, and his chronic alcoholism and drug abuse, among other matters. Farr, 621 So.2d at 1369.

POINT II

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COMMITTED FOR PECUNIARY GAIN.

In finding that the murder was committed for pecuniary gain, the trial court wrote:

> The Defendant knew the victim had $100 in her shoes. His mother had sent it to her so she could retrieve her stolen property. She had already spent $20 of the money. She used that to pay a debt of the Defendant. Prior to the killing, the Defendant had no money. He'd stolen Jane's property to get drugs. His own **mother** had sent Jane the money to pay to get her property back. The Defendant admits he took the money from her shoes after he killed her. Although not the primary reason for killing Jane Silvia, even the Defendant admits in his statement to the police, "...so that was one of the reasons that I, uh, killed her was to retrieve that money from her." He reiterated this later in his statement. Consequently, this aggravator is proved beyond a reasonable doubt.

(R259-60)

It is respectfully submitted that, as a matter of law, the evidence here is insufficient to support application of this statutory aggravating factor. The only evidence that Robinson committed the murder for pecuniary gain comes from Robinson's own self-serving confession. This Court must remember that, shortly after his arrest, Michael Robinson decided that he wanted the death penalty. He confessed to Detective Griffin and stated that he deserved execution. (R238)

This Court has previously recognized that a defendant's

confession does not necessarily carry the State's burden of proof. See, e.g., Amazon v. State, 487 So.2d 8 (Fla. 1986) (defendant allegedly confessed he killed to avoid arrest but the statement was disputed and this Court disapproved this aggravating circumstance). See also Cook v. State, 542 So.2d 964 (Fla. 1989) and Garron v. State, 528 So.2d 353 (Fla. 1988). Indeed, in this particular case, this Court should look with great skepticism on any statement from Michael Robinson. Robinson's entire motivation in this case was to attain a death sentence. He has no credibility on the issue.

Indeed, after concluding his initial statement to Detective Griffin, Robinson went back on tape one hour later to specifically claim that he stole money following the murder. (R238-39)

> Q: Ok. After you killed Jane, did you...did you take any money from her?
>
> A: Yes, uh, my mother had sent **us** some money to retrieve her things...And she had approximately a hundred dollars left of that money of the original one twenty-five. And she had told me it was in her shoes. Uh, so that was one of the reasons that I, uh, killed her was to retrieve that money from her. I didn't...I didn't want to go through any physical battle with her and have her call the police. And that was the other reason...
>
> * * *
>
> Q: Ok, when did she tell you she had the money in the...in her shoes?
>
> A: Uh, when we were...trying to retrieve her stuff. One of the drug dealers...told her that I owed twenty

> dollars and she got a twenty dollar bill out of one of her shoes...
>
> Q: Ok, so you took that money after she was dead? Is that correct?
>
> A: That's correct.
>
> * * *
>
> Q: Ok. Ok, uh, anything else?
>
> A: Uh, no. Like I said, just... you know, the reason I called her was to basically, stay out jail and...and to retrieve the money.

(R239-40) (emphasis added) The statement does not even sound credible. Robinson is telling the police what they want to hear and what he thinks will assure a death sentence.

Additionally, a reasonable construction of the evidence reveals that Robinson had just as much right to the money as Jane Silvia. Within a week of his arrest, Robinson fully confessed to Detective Griffin. Robinson explained that **his** mother sent the money to him, "...well actually to Jane. She sent the money to Jane for us to get her things back." (R230) Later, Robinson says, "Uh, Jane...**we** had used a little bit of the money. Jane had approximately a hundred dollars left on her." (R231) By the end of the taped confession, Robinson had completed the fabrication. Robinson **claimed** that he killed Silvia to obtain exclusive possession of the cash in her shoes. (R239-40) Even then, Robinson slipped up and said that "**my** mother had sent **us** some money to retrieve her things...". (R239) During the penalty phase, defense counsel pointed out that the source of the money would be a fertile area of attack on this particular

aggravating circumstance.

> ...We would have, of course, made argument there as well as the pecuniary gain argument, particularly if there's evidence that this money was actually received from Mr. Robinson's mother. So there would be questions as to whether it was his money to take or not.

(R92)

The State failed to prove this aggravating circumstance beyond a reasonable doubt. Robinson had as much right to the money as Silvia. Robinson's mother sent the money to **them**. Additionally, Robinson's confession shows that the taking of the money clearly occurred after the murder, as an afterthought. This circumstance is therefore not applicable. Clark v. State, 609 So.2d 513 (Fla. 1992); Hill v. State, 549 So.2d 179 (Fla. 1989).

POINT III

THE FINDING THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST IS UNSUPPORTED BY THE EVIDENCE.

The trial court found that Robinson murdered Silvia to avoid arrest:

> The Defendant freely admits he killed Jane Silvia to prevent her from prosecuting the theft of her TV's, microwave, and VCR. She had already reported the theft, and it was the Defendant's understanding that she had 7 days to decide if she wanted to act on that complaint. If she did not call the law enforcement agency back, nothing would happen. To his credit, he and Jane attempted to get the items back, but when the Defendant learned it would be impossible, he decided to kill her. Because he was on Control Release from the Department of Corrections, he knew that a law violation would cause him to be returned to prison to serve 17 years. He wanted to avoid this at any cost. This is proved beyond any doubt at all based on his admission and the fact that he has gone to great lengths to convince this Court to impose the death penalty instead of life in prison. Additionally, he testified that he and Jane had no argument before this occurred and he loved her. This and possible pecuniary gain are the **only** reasons for killing Jane, but avoiding arrest in prison was very definitely the dominant reason. There is absolutely no pretense of moral or legal justification for killing her. This aggravator is proved beyond a reasonable doubt. [Citations omitted]

(R257-58) It is respectfully submitted that, as a matter of law, the evidence is insufficient to support application of this statutory aggravating factor.

This Court uses a special rule when this factor is applied

for the murder of a person who is not a law enforcement officer. The State must show beyond a reasonable doubt that Robinson made a **prior** determination to murder Silvia **solely or primarily** to eliminate her as a witness. Garron v. State, 528 So.2d 353, 360 (Fla. 1988); Bates v. State, 465 So.2d 490 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984) and White v. State, 403 So.2d 331, 338 (Fla. 1981) (elimination of witness must be "dominant motive" behind murder where victim is not a police officer). Evidence of that intent must be "very strong." Hannon v. State, 638 So.2d 39 (Fla. 1994). The victim here was not a police officer, so the above-stated rules apply.

The evidence fails to support that the only reasonable conclusion that Robinson killed Silvia was **primarily** to eliminate her as a witness. The only evidence that Robinson killed Silvia to eliminate her as a witness comes from Robinson's own self-serving confession. This Court must remember that, shortly after his arrest, Michael Robinson decided that he wanted the death penalty imposed. He confessed to Detective Griffin and stated that he deserved execution. (R238) This Court has previously recognized that a defendant's confession does not necessarily carry the State's burden of proof. See, e.g., Amazon v. State, 487 So.2d 8 (Fla. 1986) (defendant allegedly confessed he killed to avoid arrest but the statement was disputed and this Court disapproved this aggravating circumstance). See also Cook v. State, 542 So.2d 964 (Fla. 1989) and Garron v. State, 528 So.2d 353 (Fla. 1988). Indeed, in this particular case, this Court

should look with great skepticism on any statement from Michael Robinson. Robinson's entire motivation in this case was to attain a death sentence. He has no credibility on this issue. The State failed to prove beyond a reasonable doubt that Robinson made a **prior** determination to murder Silvia **solely or primarily to eliminate her as a witness**.

POINT IV

THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found that Robinson murdered Silvia with heightened premeditation:

> The Defendant planned the murder of Jane Silvia very deliberately once learning he could not retrieve her property. He watched her sleeping; he got his hammer from the truck and put it in the bedroom. He sat in front of the couch watching her, waiting for her to fall asleep. He went to the bedroom to get the hammer. He came back and lay on the floor next to the couch and watched her some more. Then, when she seemed to be asleep, he began hitting her in the head with the hammer. He said that each time he hit her, the hammer went into her brain, but she was not dying fast enough and she was making some noises that the Defendant was afraid neighbors would hear. So he turned the hammer around and used the claw side to hit her. She still was breathing, so he stuck a serrated butcher knife into the soft part of her throat and down into her chest to try to stop her heart and breathing. After she was dead, he wrapped her in the shower curtain secured with a coat hanger, coax cable, and a belt and buried her. Later his first statement to the police was that some drug dealers had killed her, but ultimately when the police were zeroing in on him on August 16, 1994, he gave his final statement admitting to Detective Griffin that he killed Jane Silvia. He carried out this murder in a cold, calm manner with plenty of time to reflect on the consequences. There was no argument, no frenzy, no rage. He even said he loved Jane. He carefully planned how he would kill Jane and he

> waited for her to fall asleep so there'd be no physical fight. The manner in which he killed Jane was deliberate and ruthless. There was absolutely no pretense of moral or legal justification. Even the Defendant admits this. Even to this day, when the Defendant describes the murder, he does so in a matter-of-fact manner with no emotion. He describes the sound of the hammer hitting her head -- like a watermelon, blood gurgling from her mouth, all with no emotion. This aggravator is proved beyond a reasonable doubt.

(R259-60)

Even if this Court accepts Robinson's version of the murder, the requisite heightened premeditation is absent. After returning to the apartment at 10:30 p.m., the couple ate and Jane fell asleep on the couch. (R231) Robinson retrieved the hammer from his truck and re-entered the apartment. (R231-32) Robinson "laid in front the couch again to make sure she wasn't stirring. I laid there for a little while really nervous and shaking, cause I'd never done anything like this before. I was kind of scared about what I was fixing to do. And, uh, I got up,...I stood there and hit her in the head with a hammer..."

It is just as reasonable a construction of the evidence that Robinson was vacillating in his decision to kill Silvia. This is not the classic cold, calculated, and premeditated type of murder without any pretense of moral or legal justification. Robinson reached the actual decision to kill seconds before he committed the act. There was no poisoning of food over a period of months to dispatch a spouse for insurance proceeds. See Buenoano v. State, 527 So.2d 194 (Fla. 1988). Nor is this an elaborate plan

that Robinson concocted prior to or during the killing, thus making the homicide "execution style." See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (extensive plan included murder of robbery victim); Hill v. State, 422 So.2d 816 (Fla. 1982) (defendant made decision to rape and murder the victim before he picked her up).

Additionally, the evidence reveals a tortured individual who could not decide what to do. The evidence is just as consistent with a man vacillating in his decision to kill. This case is analogous to Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990), where this Court held that a defendant's highly emotional mental state negates this factor's requirement for a contemplative or reflective state of mind. In Thompson, the defendant confessed to having an argument with his girlfriend at night because Thompson had decided to go back to his wife. Place (the girlfriend) objected and threatened to blow up the house. When the defendant awoke the next morning, his confession stated, he decided to kill Place and commit suicide. Despite this evidence, this Court rejected the aggravating factor of cold, calculated, and premeditated.

> The state relies heavily on the fact that Thompson awoke at 8 a.m. and killed the victim at 8:30 a.m., arguing that Thompson had thirty minutes to think about what he was doing before he killed Place. But there is no evidence in the record to show that Thompson contemplated the killing for those thirty minutes. To the contrary, the evidence indicates that Thompson's mental state was highly emotional rather than contemplative or reflective. **It is**

> **an equally reasonable hypothesis** that Thompson hit his breaking point close to 8:30 a.m., reached for his gun and knife, and killed Place instantly in a deranged fit of rage. "Rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. Mitchell v. State, 527 So.2d 179, 182 (Fla.), **cert. denied**, 109 S.Ct. 404 (1988). Thus, the evidence does not support beyond a reasonable doubt a finding that this aggravating circumstance exists.

Thompson v. State, supra at 1318. See also Richardson v. State, 604 So.2d 1107 (Fla. 1992); Farinas v. State, 569 So.2d 425 (Fla. 1990); Blakely v. State, 561 So.2d 560 (Fla. 1990); Amoros v. State, 531 So.2d 1256 (Fla. 1988); Garron v. State, 528 So.2d 353 (Fla. 1988). Cf. Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983) (while prior threats and arguments may go to the issue of premeditation, "however, it is not sufficient to establish the requirement that the murder be 'cold, calculated...and without any pretense of moral or legal justification.'")

Michael Robinson is a brain-damaged crack addict who was in a highly emotional state when he killed Jane Silvia. He loved Jane and she loved him. However, his drug addiction and fear of prison drove him to murder. This is not the type of case reserved for this particular aggravating circumstance. There was no "heightened premeditation" here.

POINT V

THIS COURT SHOULD RECEDE FROM HAMBLEN.

This is another case where a capital defendant manipulates the criminal justice system in an attempt to commit suicide. Although this Court has repeatedly declined to recede from Hamblen v. State, 527 So.2d 800 (Fla. 1988), the argument is again presented here for the Court's reconsideration. This is especially true in light of the fact that, if this Court declines to reduce Robinson's sentence to life imprisonment, this Court must reverse for a new penalty phase based on the Farr[8] error set forth in Point I. When this Court does reverse this case, we all will be in a similar situation in another year or so, **unless this Court does the right thing and recedes from Hamblen**.

This Court has addressed issues surrounding a situation where a capital defendant desires that nothing be presented to mitigate his sentence and held that a competent defendant in a capital case can refuse to contest the imposition of a death sentence and waive the presentation of evidence in mitigation. In Hamblen, the defendant waived counsel and pled guilty to first-degree murder. He also waived a jury sentencing recommendation; presented no evidence in mitigation and challenged none of the aggravating evidence. On appeal, the question was whether the trial court erred in allowing Hamblen to represent himself at the penalty phase. Appellate counsel argued

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[8] Farr v. State, 621 So.2d 1368 (Fla. 1993).

that the court should have appointed special counsel to present and argue mitigation. This Court rejected his argument:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta [v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)]. In the field of criminal law, there is no doubt that 'death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.

Id. at 804. This Court also found that the judge in Hamblen had protected society's interest in insuring that the death sentence was not improperly imposed since he carefully analyzed the propriety of the aggravating circumstances and the possible statutory and nonstatutory mitigating evidence. Id. The opinion concluded:

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

Id.

Later, in Anderson v. State, 574 So.2d 87 (Fla. 1991), the defendant directed his lawyer not to present any evidence at the penalty phase of his trial. Counsel told the judge what he would have presented in mitigation had his client not directed him to do otherwise. On appeal, counsel argued that Anderson's orders

to his lawyer denied him his Sixth Amendment right to the effective assistance of counsel. He also argued the court had not determined if Anderson had freely and voluntarily waived his constitutional right to present mitigating evidence. This Court rejected both arguments, finding that Anderson's comments on the record were sufficient to waive mitigating evidence and because he had counsel, no Faretta inquiry was required. Id. at 95.

In Pettit v. State, 591 So.2d 618 (Fla. 1992), this Court adhered to the rule announced in Hamblen that a competent defendant could waive the presentation of mitigating evidence. This Court affirmed the trial court's decision to allow the defendant to waive the presentation of mitigating evidence and the subsequent sentence of death. However, this Court reiterated the responsibility of the trial judge to analyze the possible statutory and nonstatutory mitigating factors. The trial judge satisfied the requirement in Pettit when he heard the testimony of the two neurologists who had examined Pettit. Pettit, at 620.

Although Hamblen, Pettit and Anderson said that a capital defendant who wants to die can exercise control over his destiny at the trial phase -- waive counsel, plead guilty, waive the presentation of all mitigating evidence -- this same control does not extend to the appeal stage. This Court's opinion in Klokoc v. State, 589 So.2d 219 (Fla. 1991) establishes this limit on the defendant's ability to control capital sentencing. In that case, the court accepted the defendant's plea of guilty to first-degree murder, and as in Anderson, the defendant refused to permit his

lawyer to participate in the penalty phase of the trial. Counsel asked to withdraw, but the court denied the request. Then, contrary to this Court's holding in Hamblen, the trial judge appointed special counsel to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." 589 So.2d at 220. Special counsel presented mitigation. This type of procedure would also have been necessary had the trial court chosen to exercise its discretion to obtain a jury recommendation before sentencing. See State v. Carr, 336 So.2d 358 (Fla. 1976). Following his client's wishes, appellate counsel asked this Court to allow him to withdraw and to dismiss the appeal. This Court denied that request, saying:

> ...counsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence. Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.

589 So.2d at 221-222. The result of the appeal was a reversal of Klokoc's death sentence as disproportional.

This Court has consistently adhered to its decision in Hamblen, that defendants who want to die have the right to control the extent of mitigating evidence available to the sentencer. Lockhart v. State, 655 So.2d 69 (Fla. 1995); Henry v. State, 613 So.2d 429, 433 (Fla. 1992); Clark v. State, 613 So.2d

412, 413 (Fla. 1992). In Klokoc v. State, 589 So.2d 219 (Fla. 1991), this Court apparently approved the trial court's appointment of "special counsel" to represent the "public interest" in bringing forth mitigating factors to be considered by the court in the sentencing proceeding. Appellate review in Klokoc was thus facilitated and resulted in this Court vacating Klokoc's death sentence.

However, this Court has since held that a trial court need not appoint independent counsel for this purpose where a defendant wants to limit the mitigating evidence. See, e.g., Lockhart v. State, 655 So.2d 69, 74 (Fla. 1995). Nevertheless, this Court has acknowledged:

> ...that this is a troubling area of the law. On a case-by-case basis, we have attempted to achieve a solution that both honors the defendant's right of self-determination and the constitutional requirement that death be imposed reliably and proportionally.

Farr v. State, 656 So.2d 448 (Fla. 1995).

In Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993), this Court announced a prospective rule.

> Although we find no error occurred here, we are concerned with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. Accordingly, we establish the following prospective rule to be applied in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his

> investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

The parties below were cognizant of this Court's pronouncement in Koon. It is not at all clear how thorough or zealous defense counsel pursued the investigation of potential mitigation in the case at bar. In Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), defense counsel was found to be ineffective because, at his client's command, he ceased investigation of mitigating circumstances. Appellant submits that such a conclusion is not so clear in Robinson's case. Indeed, Robinson's record has some of the earmarks that indicate that counsel "latched onto" the Defendant's instruction and failed to investigate penalty phase matters. Koon v. Dugger, 619 So.2d at 250.

It is clear in this case that Michael Robinson wants to be executed by the State of Florida. Undersigned counsel is the lone voice of protest in the entire process. As a result of the constitutionally mandated automatic review conducted by this Court of all death sentences, undersigned counsel must attempt to argue against the propriety of Robinson's sentence of death. Klokoc v. State, 589 So.2d 219, 221-22 (Fla. 1991). If this direct appeal fails, Robinson can waive any further post-conviction proceedings and engage in state-assisted suicide. See, e.g., Durocher v. Singletary, 623 So.2d 482 (Fla. 1993). In

this type of situation, defense counsel finds the arguments to be sparse. Due to this Court's inconsistent application of the law in this area[9], undersigned counsel is the only person that must argue in favor of a life sentence. Michael Robinson need not and did not. He requested death. Trial counsel need not and did not. They stipulated that the aggravating circumstances were established beyond a reasonable doubt and urged the court to reject any potential mitigation. Undersigned counsel finds himself in an odd predicament. There is little basis in the record to argue for life, yet I am required to so argue by law. Klokoc v. State, 589 So.2d 219 (Fla. 1991). This is not the way it should work.

Capital defendants should not be allowed to thwart review of their cases. Hamblen and its progeny, allow a capital defendant to thwart the adversarial system at the trial court level. These holdings are inconsistent with this Court's requirement in Klokoc that the adversarial system be preserved on appeal. This Court's review of a death sentence, where the facts were not developed below, fails to protect our jurisprudence from the unfair application of this ultimate sanction. The way the procedure works now, counsel is reminded of an anonymous quote. "Prejudice is a great time saver. It allows you to form an opinion without getting the facts."

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[9] I.e., inconsistent at each stage of the proceedings, i.e., trial (adversarial process not required), appeal (adversarial process required), and post-conviction (adversarial process not required).

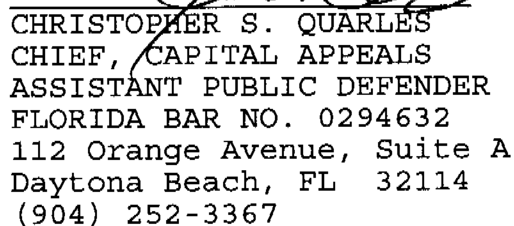
Procedures must be in place to prevent miscarriages of justice. The trial judge and this Court have the duty under the Eighth and Fourteenth Amendments to examine the record for mitigating facts and to consider those facts in reaching a decision concerning the proper sentence. Parker v. Dugger, 498 U.S. 308 (1991). This constitutional mandate fails when procedures are not in place to ensure that pertinent facts are presented in the record. In the interest of fair application and appellate review of capital sentences, this Court must recede from Hamblen and Koon. Robinson's case should be reversed for a new penalty phase where mitigation evidence can be fully developed to insure the constitutional application of the capital sentencing. Amends. V, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant respectfully requests that this Court vacate Robinson's death sentence and remand for the imposition of a life sentence. In the alternative, Appellant asks this Court to vacate the sentence of death and remand for a new penalty phase with the appointment of special counsel to develop and present the case for life.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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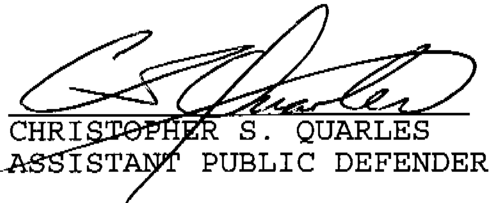
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal, and mailed to Mr. Michael L. Robinson, #713735 (45-2204-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 15th day of November, 1995.



CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER