IN THE SUPREME COURT OF FLORIDA

MICHAEL L. ROBINSON,

Appellant,

v.

CASE NO. 91,317

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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THE STATEMENT OF THE CASE AND FACTS

At the beginning of the penalty phase proceeding, Defense Counsel made "an *ore tenus* motion on behalf of Mr. Robinson to withdraw the previous plea" of guilty of the first-degree murder of Jane Silvia. (RR 17).[1] The basis was: "Robinson was not able to form an intelligent waiver of his rights . . .." *Id.* The State objected to the verbal nature of the motion and on the legal sufficiency of the "grounds stated." *Id.* at 18. Remarking that she could "remember the plea where [Robinson] told us why he did what he did and he appeared very confident to me," Judge Russell denied the motion. *Id.*

The State pointed out that this Honorable Court's opinion identified the issues raised on direct appeal from the original conviction and sentence as: (1) The trial court failed to consider valid mitigation; (2) the pecuniary gain avoid-arrest, aggravator was not proved beyond a reasonable doubt; (3) cold, calculated, and premeditated aggravator was not proved beyond a reasonable doubt; and, (4) the avoid arrest aggravator was not proved beyond a reasonable doubt. *Id.* at 18-19. The prosecutor contended that this Court had specifically held that these issues regarding the

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[1] "RR" refers to the record on appeal from the second penalty phase proceeding.

three aggravators were "without merit."[2] *Id.* at 19. Citing the law-of-the-case doctrine, the State took the position "that the aggravators that were proved during the first penalty phase have been proven beyond a reasonable doubt" for purposes of the resentencing proceeding.[3] *Id.*

The trial court ruled that she would permit the State to play Robinson's confession "to refresh my memory of that particular statement." *Id.* Defense counsel objected, asserting that "Robinson is . . . entitled to present any evidence of mitigation . . . as well as to contest the aggravators and see if they are outweighed . . .." *Id.* at 20. He added: "[O]nce you hear the mitigators, the aggravators as listed, actually two of them in a way would overlap back and could be argued as mitigation or explained in mitigation." *Id.* at 21. Counsel urged "that pecuniary gain is woefully lacking and we need an opportunity to show the Court why . . .." *Id.* at 25. Thereupon, the trial judge ruled: "I'm going to allow the State to play the tape . . .." *Id.*

Detective David Griffin authenticated the taped confession given to him by Robinson. *Id.* at 31. Then, the tape was played over defense objection. *Id.*

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[2]This appears to be an accurate statement. *Robinson v. State*, 684 So.2d 175, 180 n.6 (Fla. 1996).

[3]Defense Counsel opined: "I think that 'we find they were without merit' is certainly no intelligent discourse on the merits." (RR 28).

Defense Counsel cross-examined Detective Griffin, establishing that Robinson was cooperative with the police, expressed some remorse, helped find both implements used to kill Ms. Sylvia, and led the police to her body. *Id.* at 32. At that point, Defense Counsel announced: "Robinson wants to make a statement . . .." *Id.* However, when it became clear that the State would have the opportunity to cross-examine Robinson about any such statement, Robinson did not make one. *Id.* at 33-34.

Robinson's first witness was Dr. James Upson, a "clinical psychologist." *Id.* at 34. Dr. Upson was accepted as an "expert in the field of clinical psychology, neuropsychology." *Id.* at 36.

Dr. Upson testified that Robinson's "I.Q. comes out to be 111, which places him in the high-average range." *Id.* at 39-40. The doctor concluded that Robinson's "motor system is probably not working as quickly as it could" and he was "a little bit depressed." *Id.* at 47, 48. Dr. Upson added: "[H]e's somewhat depressed, not significantly so, but he has some depression going." *Id.* at 59. He also opined that "the left brain is not functioning as well as the right brain in the same task," possibly making the left side a little less efficient. *Id.* at 52. On the other hand, "his ability to make judgment, see connections, see hypothesis is fairly strong." *Id.* at 50. "[H]e can remember what went on," *id.* at 55, although he may be "having some trouble recalling information that is held in the left brain . . .." *Id.* at 56.

Dr. Upson "had [Robinson] go through his life and identify what he felt was (sic) significant events." *Id.* at 62. The doctor listed some of those which he considered potentially significant, including: Robinson had "a forceps delivery, but . . . no complications," *id.* at 63, at age 3, he suffered "internal bleeding," was given "a transfusion," and "had loss of consciousness . . .," *id.* at 65, when 6 or 7, he was pushed into a swimming pool and was reportedly "unconscious" and "blue," *id.* at 66, he "had attention deficit disorder" and took "Ritalin," *id.*, and he experienced "a toxic exposure accident" that "had to do with his painting a water tower." *Id.* at 70. Dr. Upson added that his "tests suggest that the problems are in the frontal-parietal-temporal, which in the literature is consistent by SPEC (sic) scans of high cocaine users." *Id.* at 74. When asked, Dr. Upson said that a SPECT scan would have been "helpful" to him. *Id.*

Regarding mitigators, Dr. Upson said that he thinks that Robinson has a "capacity for rehabilitation" and felt "he was under extreme emotional stress." *Id.* at 74, 75. To support his opinion, Dr. Upson read a statement of Robinson:

> "Once I got on the cocaine, I was like an alcoholic on a binge. I couldn't stop. I had to be using it any time I could get it, any way I could get it. I was getting it to use, the crack cocaine. I started breaking into people's houses, stealing stuff and selling to drug dealers and to the pawn shops, even stole stuff from my mother and her boyfriend.
>
> We're talking 'cause Jane Silvia died on July 25. I was using marijuana daily, but the crack cocaine was really

> what led up to her dying. It was the whole reason behind the situation. She didn't know I was using to start with because she worked at nights and that's when I would use it.
>
> I was on a binge at least the last month before she died. I was uncontrollably gone. You couldn't stop me from using crack cocaine. I couldn't stop myself even if I tried.
>
> The drug treatment place said in two weeks we can set up an appointment for you to be over at the office and you can go to an in-house treatment where they can take me off the street. I didn't need it in two weeks from then. I needed it when I went in there. I needed them to take me off the street and put me somewhere because I was out of control then and that's why I went to them for help.
>
> It was too late. They needed to take me then or it was too late. I didn't make it to the appointment because I'm not using two weeks later. I was using the next day.
>
> I had an uncontrollable compulsion to get some crack cocaine. She died because I had the opportunity to keep her from calling the police to press the charges. I was so scared to death of coming back to prison. I did not want to come back to prison because of the things that happened to me.
>
> Obviously, I got specific intent going on here. Obviously, it is premeditated. All I know is what I was feeling at the time and that was I'm scared for my life. It is like either me or it was me and her. If she lived and she called the police, I'm going to prison where I'm afraid for my life of stuff happening to me while I'm in there. In my mind, I would rather die than go back."

Id. at 75-77.

Despite defense counsel's best efforts, Dr. Upson refused to opine that Robinson's capacity to appreciate the criminality of his conduct or conform it to the requirements of law was substantially impaired. *Id.* at 77. He added that in his opinion, when Robinson murdered Jane Sylvia, he was under extreme duress because "he was fearful." *Id.* at 78. On recross, Dr. Upson testified that Robinson

"knew what he was doing was wrong when he killed Jane Silvia." *Id.* at 109.

Dr. Upson diagnosed Robinson with "polysubstance abuse, cocaine dependence, and a personality disorder, not otherwise specified." *Id.* at 83. He did not diagnose any mental disorder other than the drug abuse, drug dependence." *Id.* The doctor admitted that Robinson had "some features" of antisocial personalty, but was "more asocial than antisocial." *Id.*

Dr. Upson testified that Robinson has "magical belief in God. He believes that God controls situations." *Id.* at 86. The doctor labeled that belief as "religious preoccupation." *Id.* He admitted that if an inmate was evangelized while in prison, he could exhibit religious ideation. *Id.*

Dr. Upson testified that Robinson is not "psychotic." *Id.* at 87. He opined that any "psychotic experiences[s]" are actually "drug-induced." *Id.*

Dr. Upson testified that his tests showed Robinson had a ".3" impairment index. *Id.* at 92. He conceded that Robinson's score was "normal - for some populations." *Id.* He also said that "for the ones that it is not normal, all it is indicative of is . . . the possibility of mild brain damage . . .." *Id.* at 92-93. Thereafter, Dr. Upson testified as follows:

> [Prosecutor]: Of those tests that you gave him, you have possible indications on three of them, which ends up being an impairment index that could be mild brain damage

or could be normal; is that correct?

[Dr. Upson]: That is correct.

[Prosecutor]: . . . [W]e really don't know whether there's any brain damage?

[Dr. Upson]: Yes.

[Prosecutor]: We also don't know, if there were brain damage, how that would affect his behavior at all because we don't know where it would be?

[Dr. Upson]: That's correct.

Id. at 95-96.

Dr. Upson conceded that "[f]rom a functional standpoint," neither a SPECT scan, nor an M.R.I. could "confirm medically . . . whether or not a person has brain damage." *Id.* at 97. He explained: "They can show up anatomical deficiencies in synapsis transmission within the system, but they give us no indication of the functioning aspect of the deficit." *Id.* He added: "[I]f you show me a brain scan in and of itself, I can tell you virtually nothing about the function of that person." *Id.* at 99. Indeed, even if a SPECT scan shows an abnormality, the functioning tests may well show that the abnormality does not affect the person's functioning. *Id.* at 102. Dr. Upson admitted that he does not know whether Robinson has brain damage, and if he has some damage, he does not know what effect it would have had upon his behavior. *Id.* at 104, 105. On redirect, Dr. Upson said that a SPECT scan would "be logically the next step" in corroborating what he was "looking for." *Id.* at 108. On recross, Dr. Upson repeated that the test

index of .3 merely shows a "possibility of brain damage," and in Robinson's case could be normal. *Id.*

Robinson then called Dr. Jonathan Lipman, Ph.D. *Id.* at 111. Dr. Lipman was accepted as an expert in the field of neuropharmacology. *Id.* at 116-117.

Dr. Lipman described Robinson as "quite paranoid" while drug-free and imprisoned. *Id.* at 141. He added that Robinson "experiences pressured thought and compulsion in his thinking" and is hyper-religious. *Id.* at 141, 142. He opined that Robinson "likely . . . has some problem . . . [with] that part of the brain which is responsible for memory and emotion." *Id.* at 142. He said that Robinson "describes himself as being very paranoid, irrationally fearful . . . [and having] very much compulsion." *Id.* at 143. Dr. Lipman suggested the possibility of "abnormalities in temporal lobe function," but concluded that even though "it interferes with his daily life, . . . it wouldn't be of a degree that would necessarily keep him from functioning in normal, everyday society." *Id.*

Dr. Lipman indicated that he had recommended a certain type of brain scanning be done," which he believed would have been "helpful in furtherance of [his] evaluation," but did not otherwise identify the type of scan or its anticipated benefit. *Id.* at 150-151. On cross, he claimed to know that "the damage is there from the functional testing," and that a scan "would allow us to see the

metabolic and the anatomic origins of that dysfunction." *Id.* at 169. Nonetheless, Dr. Lipman admitted that a brain scan might not disclose any damage. *Id.* Finally, Dr. Lipman said that "regardless of which part of the brain that they [Robinson's symptoms] originate from," chronic cocaine abuse would exacerbate them. *Id.* at 172.

Dr. Lipman testified that "[a]t the time of the offense, he was clearly suffering in a state of unreality brought about by the chronic effect of cocaine." *Id.* at 153. Having examined Dr. Upson's "neuropsychological evaluation," Dr. Lipman concluded that Robinson "has borderline personality traits," *id.*, although "[h]e does not meet all of the criteria of the borderline syndrome . . .." *Id.* at 154. In his opinion, this personality type makes Robinson "more vulnerable to . . . adverse psychotic effects than other people who abuse cocaine . . .." *Id.* at 153.

Dr. Lipman testified that Robinson told him that "he was in a "very compulsive" state when he killed Ms. Silvia and "he regretted it." *Id.* at 155. Dr. Lipman labeled Robinson's behavior in this regard "premeditation." *Id.* at 156.

Dr. Lipman testified that Robinson said he "was raped in prison" and "[h]e was terrified of that." *Id.* at 157. He opined that Robinson "lack[ed] insight into alternatives" other than killing Jane. *Id.* at 158. He said that he believed Robinson was under the influence of extreme mental or emotional disturbance when

he killed Jane. *Id.* The basis for this conclusion was "[t]he symptoms that he [Robinson] was describing . . .." *Id.*

The doctor also opined that Robinson acted under extreme duress at the time he killed Jane, but pointed out that the duress to which he referred was "subjectively perceived" by Robinson. *Id.* at 159. Further, Dr. Lipman was quick to point out that Robinson clearly had "other alternatives" to killing Jane. *Id.* He said that Robinson could have left the area or have recruited "the . . . continued support of the victim." (RR 159-160).

Dr. Lipman made it clear that Robinson was not insane. He "clearly knew that he was wrong, but his ability to control his behavior was . . . impaired, given the compulsion that he describes." *Id.* at 160-161. The doctor concluded that in his opinion, Robinson's ability to conform his conduct to the requirements of the law "was substantially impaired . . .." *Id.* at 161.

On cross-examination, Dr. Lipman agreed that Robinson's score on the "impairment index," .3, "can be normal for many people." *Id.* at 163. Those include people who lack education or higher education. *Id.* at 171. Robinson dropped out of high school; he obtained his GED. *Id.* at 200.

Dr. Lipman did not disagree with Dr. Upson's testimony that Robinson did not suffer from cocaine psychosis, although he maintained that Robinson appears to have some "characteristic[s] of

chronic cocaine psychosis." *Id.* at 164-165. Likewise, Dr. Lipman conceded that Robinson "doesn't meet all of the definitions (sic) for the diagnosis of borderline personality disorder, . . . but he has many of the borderline traits . . .." *Id.* at 166. He clarified: "Dr. Upson's . . . data are far more explicit, of course, than my impression, which is formed from a symptom evaluation" - symptom information which came to the doctor from Robinson's self-report. *Id.* at 168, 173. Dr. Lipman concluded that Robinson "had a compulsion and an emotional disorder brought about by chronic cocaine abuse." *Id.* at 172-173. He admitted that same was a pharmacological opinion" not a psychological one. *Id.* at 173.

Robinson's final witness was his mother, Barbara Judy. Ms. Judy said that Robinson "had a severe drug problem" for which he had been treated a couple of times." *Id.* at 176-177. She claimed that "[e]very time he got in trouble, it was tied to drugs." *Id.* at 177. She said that Robinson did not have a "nurturing or loving father." *Id.* at 181. She added that Robinson "couldn't make friends at school . . .." *Id.* at 184. Nonetheless, she maintained that Robinson displayed "love and affection towards" her. *Id.* at 184.

Ms. Judy said that Robinson "was always creating things that he thought he called bombs and doing things that were dangerous." *Id.* at 185. For example, "he would stick wires in the wall and

cause explosions." *Id.*

Ms. Judy indicated that she had a strong religious faith, and it kept her from considering divorce. *Id.* at 189. She said that Robinson's father struck him a few times, but she "learned how to intercede before Michael got . . . him to the point that he was irritated." *Id.* at 190. She also said that discipline was not consistent in the Robinson household. *Id.* at 191.

According to Ms. Judy, Robinson's paternal grandfather was a hypochondriac and died in a mental hospital. *Id.* at 192. Ms. Judy filed for divorce when Robinson was 14; Robinson's running away from home after being involved in some type of criminal activity with older boys in the neighborhood precipitated it. *Id.* at 193, 194. Prior to that time, Robinson had not been drinking alcohol to her knowledge and had not been arrested. *Id.* at 193.

Thereafter, Robinson voluntarily enrolled in a military academy. *Id.* at 194. However, he was arrested for breaking and entering and was sent to Florida to live with Ms. Judy's sister. *Id.* at 195, 196. While in Florida, Robinson did not attend school, although he deceived his aunt about that fact. *Id.* at 196-197. Robinson was picked up by the juvenile authorities and placed in a detention center. *Id.* at 197. Ms. Judy and her other child moved to Florida near her family, and Robinson became a ward of the State of Missouri. *Id.*

Robinson "took a lot of his animosity out on his brother." *Id.* at 198. "He was real mean to him." *Id.* Ms. Judy knew that she had to work and she "could not protect my younger son" from Michael, so she left Robinson in the detention facilities. *Id.* at 198. However, Ms. Judy and Robinson corresponded and talked by phone. *Id.* at 198-199. Robinson felt that Ms. Judy was responsible for "[a]ll of his problems." *Id.* at 199.

Robinson joined the Missouri National Guard and obtained his G.E.D. after leaving the detention facilities. *Id.* at 200, 201. He married, visited Ms. Judy with his wife, and moved to Texas. *Id.* at 199, 200. Although Robinson did not keep in close contact with his brother, *id.* at 200, "he did have some interaction with his brother for a short period." *Id.* at 201.

Robinson broke into the home owned by Ms. Judy's fiancee, and he went to jail for burglary. *Id.* at 208. When he was released, Ms. Judy moved to "Orlando and lived with him." *Id.* Whenever he "got to the bottom," he "would allow" Ms. Judy to get help for him. *Id.* at 209. "From the time he was a little boy, I saw it coming . . .. Nothing I did or none of the help I was able to find worked." *Id.* at 209-210. Acknowledging "[t]here's no excuse for what he did," Ms. Judy proclaimed her love for her son. *Id.* at 209, 210.

Turning to the facts surrounding Ms. Silvia's murder, Ms. Judy admitted that Robinson had stolen and sold Ms. Silvia's things for

"the second time." *Id.* at 211. Ms. Judy "had paid for them to get them back" the first time. *Id.* Ms. Judy knew that Ms. Silvia had reported the second theft to the police. *Id.* at 212. Robinson told her that "he was afraid that [Ms. Silvia] was going to call the police." *Id.* Ms. Judy knew that a violation of the law would put Robinson back into prison. *Id.* at 213. She also knew that some unspecified thing had happened to him in prison. *Id.*

The day before Robinson killed Ms. Silvia, he visited his mother. *Id.* Ms. Judy explained:

> Jane was going to call me, and when she didn't -- I knew she was trying to help get him in a drug treatment program and I knew that this girl who had been very kind to me would have called if she had been able to; and when she did not and I found out that she was missing, . . . I knew that . . . it was by his hand.

Id. at 214.

Ms. Judy discounted the influence of drugs on the behavior which resulted in Ms. Silvia's murder. *Id.* at 214. She maintained that Robinson's problems had been present "at the very beginning of his life." *Id.* at 214.

Ms. Judy added that Robinson thought he was acting in self-defense when he killed Ms. Silvia. "He thought that going back to jail and being raped and beaten was the only thing that he had to look forward to as long as she was alive." *Id.* at 215. She added: "That's wrong, but I know that in his mind, that's the way he saw it." *Id.*

At that point, the judge asked: "Well, let me ask you this. If he were to get life in prison, he's going right back to the same situation, right?" *Id.* Ms. Judy responded that Robinson has now "decided that he can cope" with the circumstances which he once thought were so abhorrent that avoiding them warranted the instant murder and for which he wanted to be executed. *Id.* at 215-216.

On cross-examination, Ms. Judy stated Ms. Silvia was trying to get Robinson into a drug rehabilitation program. *Id.* at 216. Ms. Judy explained that she sent money to buy back Ms. Silvia's property because Robinson had taken her V.C.R., T.V., and microwave. *Id.* at 218. She testified: "So I got her on the phone and told her that I was going to be wiring the money and I would wire it in her name for her to pick up." *Id.* at 219. The money was sent in Ms. Silvia's name. *Id.*

Ms. Judy's testimony concluded the defense's penalty phase. The State reminded the court that Ms. Silvia's brother, John Thomas, had asked to address the court. *Id.* Mr. Thomas blamed his sister's death on a faulty justice system which permitted Robinson's early release from prison. *Id.* at 220. He asked for justice, pointing out: "Because he's got a drug problem, let's throw the kid in jail for life. That's not justice." *Id.*

In closing, the State reminded the court of the cold, calculating sound in Robinson's voice as he described how "putting the hammer through Jane Silvia's skull was like a watermelon." *Id.*

at 223. In his statement given on 1/23/95, Robinson explained the circumstances surrounding his murder of Jane.

He had taken Jane's "tv, microwave, and a VCR . . . and pawned them to a drug dealer for crack cocaine." (OR at 320).[4] Ms. Judy had "sent the money . . . to Jane . . . to get her things back." *Id.* However, "it was not possible for us to get those things back." *Id.*

Although they "had used a little bit of the money[,] Jane had approximately a hundred dollars left on her . . . in her shoes . . .." *Id.* at 231. They returned to Robinson's house and after eating, Jane "fell asleep on the couch." *Id.* Robinson "went out to my truck and I had a long handled, steel handled, uh, uh, drywall hammer.". . . I went out and retrieved that . . . .." *Id.*

When he returned, he saw Jane "stirring a little bit," and he took the hammer wrapped in clothing into his bedroom "and laid it down." *Id.* at 232. He returned, got something to drink, and "sat in front of the couch where Jane was lying. I waited for her to go back to sleep." *Id.* When he judged her to be asleep, he

> went back in and got the hammer, came back and laid in front of 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.

Id. Thereafter, he arose, took the hammer and "went around."

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[4]"OR" refers to the record of the original trial and penalty phase proceedings.

> There was enough space there for a man to stand in between the wall and the couch. . . . I stood there and hit her in the head with the hammer, uh, one time. She didn't move for a minute and then she....uh, her body raised up and as it did, I hit her again in the top of the head. The hammer went through the skull. . . . Both times. . . . All times. Every time I hit her, it went through her skull.

Id. at 232-233. According to Robinson, Jane's "body kept moving . . .." *Id.* at 233. Repeatedly, he asserted that there was "no way she could have been conscious." *Id.* Nonetheless,

> as the body raised up, blood came out the mouth. The body was still breathing and...and the heart was still beating, I'm sure. Uh, I think the third time...I hit her once and she raised up. I hit her a second time, she laid there for a few minutes and her body raised up again. **I wanted to make sure she wasn't conscious**, so I turned the hammer around for the claw part and stuck it through her head. Uh, and when we recover that, you'll still see it. There's matter in the claw of the hammer . . . being from Jane Silvia's body tissue.

Id. (emphasis added). Robinson insisted that "there's no way that she was possibly conscious. . . . [S]he died in her sleep" *Id.* He opined that "it was just body reactions. . . . Muscles . . . the heart and stuff was still beating." *Id.*

Although at first, he claimed "there was no verbal sound of anything out of her mouth," he later said:

> [T]here was blood coming from her mouth. . . . You understand, the breathing and there was blood coming out of her mouth. Uh, and it was making gurgling sounds, right? At that point, **I was worried about a neighbor hearing** cause the walls are real thin and...it wasn't really a lot of sound. It sounded like maybe putting a hammer to a watermelon, like I stated before. Uh, anyway, so at that point, I have a serrated butcher knife, about 18" long. Like a turkey...turkey carving knife? . . . Something like that. It's not...maybe it's

> not quite 18." Uh, it's a good 12." I stuck it down through her, the soft part of her throat, down into her chest to try to stop the heart and the breathing **so that the noise would stop.** Which I believe I did successfully.[5]

Id. at 234 (emphasis added) (footnote added). After detailing how he wrapped Ms. Silvia's body and buried it, Robinson expressed remorse. *Id.* at 237. He added that he and Ms. Silvia had "had no arguments," and "what I did" was "unnecessary." *Id.* at 237-238.

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[5]The medical examiner found "two stab wounds to her neck, . . . three stab wounds to her chest . . [t]his was the cause of death . . . .." (OR 21).

SUMMARY OF THE ARGUMENTS

POINT I: The trial court did not err in denying the appellant's motion to withdraw his guilty plea. The motion was untimely, and therefore, it should be denied on that procedural bar. Further, the trial court considered the grounds advanced for the motion, and the appellant made no indication that he did not have a sufficient opportunity to present the basis for his motion. Thus, the claim that he was inappropriately precluded from from presenting his "argument" for withdrawal of the plea is not preserved for appellate review. In any event, the record shows that the appellant made a knowing and intelligent waiver of his right to a trial, and there is no basis for withdrawal of the guilty plea. Finally, the appellant has repeatedly admitted, and continues to admit, that he murdered Jane from a premeditated design. Thus, no claim of manifest injustice is presented by this case.

POINT II: The trial court did not err in denying the appellant's request for a SPECT scan. The request was untimely made, and therefore, it is procedurally barred. In any event, no showing of prejudice has been made. Neither has the appellant established that the test was necessary to his expert's opinions, and therefore, no reversible error occurred.

POINT III: The trial judge did not prejudge the appellant's penalty proceeding. Neither the comments of the judge, nor the denial of a small fraction of the additional funds the defense wanted show any bias, prejudice, or prejudgment. The trial judge

carefully considered all of the evidence presented to her, and the appellant's disagreement with her decision does not provide a basis for a claim of judicial prejudgment.

POINT IV: The appellant's sentence of death is proportionate. There is no "alcohol haze" exception to the death penalty, and even if there were, it does not apply to this case. Likewise, there is no domestic dispute exception to the death penalty. The trial judge's determination that the three aggravators outweighed the nonstatutory mitigation should be upheld by this Honorable Court.

POINT V: The trial court did not err in finding that the aggravating factor - committed for pecuniary gain - was proved beyond a reasonable doubt. That this aggravator was proved was decided in the appellant's previous appeal. This Court's decision on that issue is the law of the case, and therefore, the issue should not be further considered here. In any event, the appellant is entitled to no relief. The trial court applied the correct rule of law, and competent substantial evidence supports the judge's finding that the murder was committed for pecuniary gain.

POINT VI: The trial court did not err in finding that the aggravating factor - committed to avoid arrest - was proved beyond a reasonable doubt. That this aggravator was proved was decided in the appellant's previous appeal. This Court's decision on that issue is the law of the case, and therefore, the issue should not be further considered here. In any event, the appellant is entitled to no relief. The trial court applied the correct rule of

law, and competent substantial evidence supports the judge's finding that the murder was committed to avoid arrest.

POINT VII: The trial court did not err in finding that the aggravating factor - committed in a cold, calculated, premeditated manner - was proved beyond a reasonable doubt. That this aggravator was proved was decided in the appellant's previous appeal. This Court's decision on that issue is the law of the case, and therefore, the issue should not be further considered here. In any event, the appellant is entitled to no relief. The trial court applied the correct rule of law, and competent substantial evidence supports the judge's finding that the murder was committed in a cold, calculated, premeditated manner.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA.

At the commencement of the resentencing proceeding, Robinson made an *ore tenus* motion to withdraw his guilty plea. (RR 17). The sole ground for the request was that at the time the plea was entered "Robinson was not able to form an intelligent waiver of his rights . . .." *Id.* The State responded, opposing the motion on two stated grounds, to-wit: "[T]he motion has to be in writing," and the basis for the request was insufficient. *Id.* at 18. The trial judge, who was the judge who took the plea, then addressed the issue, stating that she could "remember the plea." *Id.* Relying on her specific remembrance of what Robinson said, and the way he appeared when entering the plea, the court denied the motion, *id.*, implicitly finding that the plea was voluntarily entered, and as such, the waiver of his rights was intelligent.

Clearly, Robinson stated his reason for his request to withdraw the plea and the trial court ruled directly thereon. Robinson did not complain in the lower court that he had not been allowed to elaborate on the reason he "was unable to form an intelligent waiver at the time of the plea." *Id.* at 20. There is simply no indication that Robinson did not say everything he wanted to say on the issue at the time.

Thus, the claim that the trial judge inappropriately precluded Robinson from presenting his "argument" for withdrawal of the plea is not preserved for appellate review. Further, even were preservation not required, there is no record indication that counsel was prevented from making any argument he wanted. Finally, there was no error in the trial court's ruling because the ground stated was insufficient on which to obtain relief.

The plea colloquy clearly shows that Robinson made an intelligent waiver of his right to a trial. Prior to the entry of the guilty plea, Defense counsel asked the Court to order a psychiatric evaluation to verify Robinson's competence to enter the plea. Counsel stated "[w]e think that he's competent. Dr. Berland has said that he's competent. We can go forward with the plea today." (OR 2). Based on that representation, the trial judge agreed to proceed with the plea hearing "contingent upon Dr. Kirkland's report" confirming Robinson's competency. *Id.* at 3, 4.

Thereafter, Defense Counsel explained that Robinson "does not wish to present any defense" and "does not want to present any mitigation." *Id.* at 6. He added that Robinson "is seeking the death penalty." *Id.*

Defense Counsel asked for

> an extensive colloquy to make sure that Mr. Robinson understands all the rights that he is giving up. and to make sure that we have explained to him in detail what would be involved and the efforts that we have made to try to convince him that we feel that we have certain defenses that we could raise, that this is, in our opinion, not necessarily a death penalty case. And that there are certainly a number of issues that could be

> raised at trial. Certainly even if he were to be found guilty at trial, there . . . is no certainty that any appellate court . . . would necessarily uphold any death penalty sentence. So we feel that there are a number of ways that we can assist him.
>
> . . . We've seen him on a number of occasions . . . and . . . Dr. Berland has also seen him. And we do feel that he is competent to proceed here today and understands what's going on.

Id. at 6-7.

Thereafter, an extensive plea colloquy ensued. Mr. Robinson was asked whether he understood that if he entered the guilty plea he "would only have the option of death or life in prison." *Id.* at 7. He responded: "Yes, Ma'am, I do." *Id.* Thereafter, Robinson was sworn and proceeded to answer many questions and provide a detailed factual basis for his plea. *Id.* at 8-9. Robinson provided his age, his educational background, a history of where, and with whom, he had lived throughout his life, his work and military service history, and his two-year marriage. *Id.* at 8-10.

He told the judge that the last time he did crack cocaine was "[s]hortly before this incident happened." *Id.* at 9-10. He defined "shortly" as "days" before. *Id.* At 10. He added that he was not feeling any effects of that drug at the time he murdered Jane. *Id.*

He told Judge Russell that he wanted to plead guilty to Jane's murder, and he was doing so freely and voluntarily. *Id.* at 11. He acknowledged having been seen, and evaluated, by Dr. Berland who had found him competent. *Id.*

Robinson explained that he killed Jane because he "was on

parole . . . on a nine year sentence." *Id.* at 12. He had been released "on CRD" after nine months, but "was on parole for seven years . . .." *Id.* at 12, 13. He had stolen a "TV, microwave, [and] VCR" from Jane, who had reported it to the police. *Id.* at 13. Jane "was given seven days to call back and have the charges initiated." *Id.* To him, "[t]he choice . . . meant ten years in prison on top of seven years I would get for violation of parole . . . if she made that call . . .." *Id.* When Judge Russell interjected: "Now you're looking at more than that," Robinson responded: "If I got away, I was looking at nothing." *Id.* Acknowledging that he thought it was possible for him to get away with Jane's murder, he added that in any event, he "would have rather faced death than go back to prison for seventeen years."[6] *Id.* at 13-14. Robinson said that he was well aware that in pleading he was facing the death penalty or "natural life behind prison bars." *Id.* at 14.

Judge Russell then asked: "How did you kill her?" *Id.* at 15. Robinson proceeded to explain that he tried to get Jane's things back, but was unsuccessful. *Id.* He had kept that information from her though, and "[s]o she wasn't aware of the danger that she was in." *Id.* He added: ". . . I understood that once I had explained to her that she would no longer be able to get her things back, she

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[6]He explained that he had been in prison four times in his 29 years, and he did "[n]ot very much" like it. (OR 14).

was going to make the call. . . . I didn't feel like I could take that risk." *Id.*

Regarding the help of his attorneys, Robinson told the court that

> [t]hey have tried to explain to me everything that is going on, what the possibilities were, you know, what they could do. And they, you know, went to the court. They actually got me an extra lawyer that I, you know, beyond what I need. . . . and they are very good, and I'm very satisfied with what they have tried to do for me. . . . And they showed me . . . case law explaining that they have to do what I asked them to do concerning my defense as long as I am competent . . . and showed me case law concerning the court proceedings.

Id. at 16-17. Robinson added that although his attorneys had tried to talk him into "fighting this," he did not think they could win at trial, especially not in view of the full confession he had given the police. *Id.* at 17. He explained that as a Christian, he preferred to die and go to heaven rather than to spend his life in prison. *Id.* at 18.

Robinson assured the court that no one had promised him anything in exchange for his plea. *Id.* The State then presented the factual basis for the murder charges which was taken directly from the "full confession" Robinson had given the police. *Id.* at 18-21. A copy of the transcript of the confession was placed into evidence in support of the factual basis for the plea. *Id.*

Thereafter, Robinson supplied additional details of the crime. He opined that Jane did not wake up when he struck her, and the raising of her body was a "muscular reflex." *Id.* at 22. He

assured the court: "I happen to be a very intelligent person," who "killed someone" and feel that "I deserve the death penalty." *Id.* at 22-23.

At that point, Defense Counsel engaged Robinson in an extensive, detailed colloquy on the issue of counsels' advice and Robinson's instructions regarding the attorneys' handling of his case. *Id.* at 23-27. During same, Robinson affirmed that his attorneys had "taken extensive depositions in this case" and had shown him "all of the evidence . . .." *Id.* at 26. Robinson reiterated that his attorneys had done "a hundred percent of everything that you could have done, or that I would allow you to do." *Id.* at 27. He added that although his counsel had explained to him what efforts they would use to try to get him off altogether, he did not feel that there was any chance that they would succeed. *Id.* at 28.

Robinson acknowledged that he understood that entering a guilty plea would not affect the ultimate sentence; it would not increase, or decrease, the likelihood of being sentenced to death. *Id.* at 28, 29, 30. Thereafter, he reiterated that he was nonetheless "[s]ure, absolutely" that he wanted to enter the guilty plea.

Thereupon, the trial judge found:

> After talking to you and the attorneys talking to you, I've asked more questions than normal because I want to get a feel for where you are mentally. It appears to me that you are alert and intelligent, and you seem to understand the consequences.

Id. at 30-31. In an abundance of caution, and because one of the previously appointed mental health experts had not done an adequate evaluation of Robinson, Judge Russell appointed Dr. Kirkland to examine Robinson and report on his competency. *Id.* at 31. In so doing, the judge made it clear that the appointment was being done in an abundance of caution, noting "I have no reason to believe that it won't come back the same as Dr. Berland." *Id.* at 31. Thereafter, Judge Russell accepted the plea. *Id.* at 35.

Dr. Berland's report, dated the day after the plea proceeding, stated that Robinson falls within "the superior range of intelligence," having an IQ of 120. Appendix A, at 2. He concluded that

> [d]espite . . . [a] history of symptoms of mental illness . . ., there was no evidence . . . recommending that this defendant be found incompetent to proceed to trial. . . . It was evident from both the actions that he described and from his reports of his thoughts at the time that he was clearly aware of the nature, the immediate consequences, and the wrongfulness of his actions at the time of this offense. There was therefore no evidence to support an insanity plea in this case. Additionally, he denied recent substance abuse or the symptoms of mental disturbance which might permit consideration of a 'Gurganus defense,' in which questions regarding his ability to form specific intent might be raised at trial.

Appendix A, at 2, 3. Dr. Berland added that "[t]he only clinical-legal issue . . . found was mitigation at sentencing." *Id.* The doctor made clear that in reaching his opinion of competency, he was aware of Robinson's reasons for refusing to permit the presentation of mitigation at sentencing. *Id.*

Approximately two weeks later, Dr. Kirkland examined Robinson,

and on February 7, 1998, he issued his evaluation and opinion. Appendix B. Dr. Kirkland concluded that Robinson:

> 1. was legally sane at the time of the commission of the act of murder of his female friend, Jane Silvia.
> 2. was mentally competent to stand trial, and **to enter a plea of guilty.**
> 3. is competent to be sentenced.

(emphasis added) Appendix B, at 1.

Robinson killed Jane Silvia on July 24, 1994. (OR 256). The rule governing the taking of guilty pleas provided:

> Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall be accepted by a court without the court first determining, in open court, with means of recording the proceedings stenographically or mechanically, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness and that there is a factual basis for the plea of guilty. A complete record of the proceedings at which a defendant pleads shall be kept by the court.

Fla. R. Crim. P. 3.170(j). The standard of review of a trial court's denial of a motion to withdraw a guilty plea is "abuse of discretion." *Hunt v. State*, 613 So.2d 893, 896 (Fla. 1992).

In *Elledge v. State*, 706 So.2d 1340, 1344 (Fla. 1997), this Court held that a plea colloquy, which could only be described as extremely sparse compared to that in the instant case, was sufficient on which to "conclude that Elledge had 'full understanding of the significance of his plea and its voluntariness 'as required by rule 3.170(j)." In the instant case, the trial judge had the benefit of a much more lengthy and detailed plea colloquy involving extensive personal participation by Robinson. Both of his trial counsel and the two prosecutors also

participated. It is clear that Robinson knowingly, voluntarily, and intelligently entered his guilty plea, having full understanding of the significance thereof.

Further, the trial judge was aware of Dr. Berland's evaluation of Robinson's mental state and his opinion that Robinson was competent. In an abundance of caution, she accepted the plea on the condition that Dr. Kirkland's evaluation also reflect an opinion of competency. Clearly, it did so. Robinson has not demonstrated that the trial judge's denial of his motion to withdraw his guilty plea constituted an abuse of discretion, and therefore, he is entitled to no relief.

Finally, contrary to Robinson's rather unique contention on appeal, there is no "extreme remorse" exception to the rules relating to the voluntary entry of guilty pleas. In other words, the fact that a defendant was remorseful and that remorse may have been one of the reasons he entered a guilty plea does not render the plea involuntary. Indeed, the State submits that it indicates the opposite, i.e., a considered decision to accept responsibility for his wrongful action in murdering Jane Silvia.[7] However, even were this a legitimate basis for such a request, the ground was not advanced below, and therefore, it is procedurally barred in this Court. *See Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982).

Neither does *Gunn v. State*, 643 So.2d 677 (Fla. 4th DCA 1994)

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[7]It is noteworthy that the guilty plea was not entered until some six months after the murder which engendered the alleged remorse.

afford Robinson a basis for relief. *Gunn* was remanded to "give appellant a fair opportunity to be heard on his timely motion to withdraw his plea . . .." 643 So.2d at 679. The facts show that after Gunn's counsel equivocated on the making of a motion to withdraw the plea, Gunn voiced such a motion and was "cut off from attempting to argue his motion" by the court's ruling denying same. *Id.* Clearly, those are not the facts of the instant case.

Robinson's counsel made the motion to withdraw the plea, stating the ground on which it was based. The State then responded opposing the motion. Thereafter, the judge expressed her clear recollection of the extensive plea colloquy and information surrounding the taking of the guilty plea and ruled that same was sufficient to overcome the ground asserted. Judge Russell's ruling that Robinson's plea was voluntarily and intelligently entered came after Robinson had a fair opportunity to be heard on his motion and after adequate reflection and consideration by the trial judge. Thus, *Gunn* is not applicable to the instant case; moreover, it provides no basis for relief in this case.

Regarding Robinson's clarification of the motion to withdraw his plea, he stated:

> . . . I wanted to withdraw the plea. You have denied that already. I gave that plea because again, I didn't want to give any chance of any other outcome happening except for the death penalty. . . . There was only one reason at the time that Jane died and that was because I didn't want to go to prison.

(RR at 235). He pointedly disavowed the other reason which he had given in his confession, i.e., to steal the money Jane had in her

shoe. *Id.* Later, however, he offered: "The reason I wanted to withdraw my plea was because I was under extreme duress . . .." (RR at 236). It is apparent from Robinson's speech to the court that this man of high intelligence had read and grasped the significance of the case law his attorneys had provided him and was slanting or outright changing, the facts to lessen his culpability.[8]

The fact that Robinson has changed his mind about the desirability of the death penalty does not render the plea he gave involuntary or unintelligently entered. Indeed, Robinson can show no prejudice or manifest injustice in not being permitted to withdraw that plea. He claims that he entered the plea because he wanted the death penalty. He claims that he wanted to withdraw that plea because he no longer wants the death penalty. He does **not** claim innocence of Jane's murder; in fact, at resentencing, he again fully confessed his guilt of her murder. On resentencing, he had his chance to avoid the now undesired penalty. The fact that he was unable to convince the judge that the mitigation outweighed the aggravating circumstances does not provide him a basis to withdraw a plea to a crime which he freely admits having committed. Having had a chance to avoid the sentence he no longer wants, he can show no prejudice in the denial of the motion to withdraw the

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[8]It is interesting to note that Robinson managed to manipulate the process so that he could address the Court on these matters without being subjected to the cross-examination which the judge had earlier indicated would be permitted had Robinson addressed her when he had first indicated a desire to do so. At that time, faced with the prospect of cross-examination, Robinson chose not to speak. (RR 33-34).

guilty plea. Neither can he show manifest injustice where he has repeatedly, voluntarily confessed his guilt of the murder to which he pled guilty. Thus, he is entitled to no relief.

Robinson's further claim that he demonstrated good cause for the withdrawal of the guilty plea is irreconcilably in conflict with his claim that the trial judge cut him off from presenting his basis for withdrawal. His claim that his "mind was still clouded with drugs at the time he entered the plea" is without merit. The murder occurred on July 25, 1994. (OR 18). The plea was entered on January 23, 1995. *Id.* at 1. Thus, Robinson had been off the drugs he now claims were clouding his mind for some **six months** when he entered the plea. Also Robinson's attorneys, the trial judge, and Dr. Kirkland concluded that Robinson was competent to enter the plea. (OR 2, 35; Appendix B). He did not offer any evidence below to support his appellate claim that his mind was "clouded with drugs." Thus, there is no factual support for this claim, and it is wholly without merit.

Finally, on appeal, Robinson claims that he has changed his mind and now wants a life sentence. However, at resentencing, he told Judge Russell quite a different tale. He said:

> I still didn't ever change my mind. Do you remember when I was here in January, you asked me had I changed my mind? I avoided your question. When I went back to my cell, people talked to me; and since then all I have allowed is that my lawyers, God, the judge and everybody do their job.
>
> The first time when I was in your court on this, I didn't allow my lawyers to do their job. So all I have done is taken my hand out of the situation and let the court proceed . . ..

(RR 232). He further indicated that his decision to let everyone do their jobs was motivated by his belief that anything else was essentially equivalent to suicide, which he felt was wrong "[d]ue to religious scruples." IB at 22. At resentencing, Robinson let everyone do their jobs, and the result was imposition of the death penalty. He has no basis for invalidation of his guilty plea based on his appellate counsel's characterization of Robinson's motive in entering the plea as "suicidal."

Robinson's claim that he should be permitted to withdraw his guilty plea because he "lost the benefit of his 'bargain'" (IB at 23) is absurd. He claims that at the time he entered the plea, he "knew that his refusal to cooperate with the development of mitigating evidence would **have** to result in a death sentence." (IB at 23). The death penalty was, in fact, imposed. However, when this Honorable Court vacated that sentence, he lost the benefit of his bargain - which was the death penalty. Therefore, he claims entitlement to withdraw his plea.

Clearly, Robinson did not lose the benefit of his bargain as he still has the death penalty, and the State is certainly willing for him to keep it - in fact, insists on it. Of course, Robinson's counsel seeks to withdraw the plea to try to yet avoid the very benefit he claims Robinson lost. This argument is patently frivolous.

Moreover, there was no written agreement for a specific sentence. At the time the plea was entered, it was crystal clear that there was no agreement, written or oral, regarding the

sentence Robinson would receive, and Robinson well understood this. (OR 18, 29, 30). Thus, Robinson is not entitled to withdraw his plea based on this Court's vacation of his original sentence of death.

Robinson's request to withdraw his guilty plea was properly denied by the trial court. This Honorable Court should uphold that decision.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING ROBINSON'S MOTION FOR A SPECT SCAN.

On January 17, 1997, the Honorable Judge Dorothy Russell held the first hearing in this case after this Honorable Court's November 21, 1996 remand for resentencing "within sixty days." *Robinson v. State*, 684 So.2d 175, 180 (Fla. 1996). Some five months and three hearings later, seven months after this Court's remand, on June 5, 1997, Robinson first mentioned a desire to have a SPECT Scan performed on him. *See* 2SR 102.[9] He told the court that the test would determine "brain injury." (2SR 103). However, Robinson did not follow through and obtain a ruling on the scan at the June 5th hearing.

On June 11, 1997, Robinson asked for more time and more money for experts and tests. Judge Russell pointed out that this Honorable Court had already extended the time for the resentencing once, and commented:

> He's entitled to fair representation. He's not entitled to perfection. . . . I think we're at the point where enough is enough.

(1SR 46).[10] Defense Counsel insisted that Dr. Upson would not be ready to proceed to hearing in the nine days remaining because the "second (sic) scan needs to be set up and prepared." *Id.* Judge

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[9]"2SR" refers to the second supplemental record in this case.

[10]"1SR" refers to the first supplemental record in this case.

Russell noted that Dr. Upson, who was allowed into the case to replace another expert because Dr. Upson had assured the court that he could be ready by the resentencing date, had not secured the SPECT scan despite having had "a little over two months" to do so. *Id.* at 52. Thereupon, Defense Counsel represented to the court that the scan would show "whether or not there's brain damage . . .." *Id.* at 53.

The State opposed the test because of its experimental nature which was "not ready for forensic application," and because the SPECT scan "doesn't have the same degree of accuracy as a P.E.T. Scan" which was not then being sought. *Id.* at 54-55. The prosecutor explained that the medical experts in the field objected to the interpretation of the scans by anyone other than a medical doctor with a specialty in radiology or neurology. *Id.* at 55. The State asserted that the SPECT scan "wouldn't pass at this point the Rodriguez Frey test . . ." and opposed the scan "because we don't think they are to the point in their scientific development where they can be relied upon" and "also . . . Dr. Upson is a neuropsychologist . . . unqualified to read this nuclear medicine test." *Id.* at 56-57.

At the July 1, 1997 hearing, Robinson again raised the issue of a SPECT scan. (RR 2). Defense Counsel told the court that the scan was "set for July 14th." *Id.* The resentencing was scheduled for July 24th. (RR 15). The State objected, reasserting the unreliability of the scan. *Id.* at 4-5. The prosecutor pointed out

that Robinson had had "a battery of 14 tests." *Id.* at 6.

The trial judge agreed that Robinson had received numerous tests and had mitigation specialists assist with mitigation, stating: ". . . [H]e's had about as much as any person in the world has had. I don't think another test is going to -- this creates more delays and more problems down the road." *Id.* at 6-7. Judge Russell added:

> I think he's had apparently every kind of test known to man except for this one. And if there's any reason to believe that this one is not recognized as a scientifically accepted test in the community, I don't want to go there.
>
> I think this man has had about every test that I can ever imagine needing to make such a decision. . . . [T]he $500 doesn't worry me. What worries me is the ramifications and the repercussions and the uncertainty of the test . . ..
>
> . . . You've got what I think is more than adequate in this case, and I don't . . . want to go any further.

Id. at 7. She further stated:

> . . . I am not going to just go on ad infinitum with test after test after test. I think there's sufficient evidence here that you can present a very complete profile on Mr. Robinson.

Id. at 8. Judge Russell declined to "go with this physical test." *Id.* at 9.

Dr. James Upson, a "[c]linical psychologist," testified for the defense. (RR 34). He was accepted as an "expert in the field of clinical psychology, neuropsychology." *Id.* at 36. Dr. Upson explained the in-depth testing he conducted on Robinson which included extensive background information, interviews with Robinson

and his family members, and police and other agency information regarding the case.

Dr. Upson's testing revealed that Robinson has a "full scale I.Q." of "111, which places him in the high-average range." *Id.* at 39-40. He scored Robinson's memory at 106, stating: "His delayed recall is quite good. . . . [I]f you give him something and 30 minutes later ask him about it, he can remember what went on." *Id.* at 55.

Regarding the SPECT scan, Dr. Upson said:

> My tests suggest that the problems are in the frontal-parietal-temporal, which in the literature is consistent by SPEC (sic) scans of high cocaine users.

Id. at 74. He added that a SPECT scan would have been "helpful" to him in this case. *Id.*

On cross-examination, Dr. Upson admitted that Robinson's impairment index was one which could well be normal. *Id.* at 95-96, 110. He also conceded that he did not know whether there was any brain damage at all, and if there was any, where it was or how it affected Robinson's behavior. *Id.* at 96. Dr. Upson added that the SPECT scan would not confirm medically whether or not a person has brain damage. *Id.* at 97. He explained the test "can show up anatomical deficiencies in synapsis transmission within the system, but they give us no indication of the functioning aspect of the deficit." *Id.* Dr. Upson said: ". . . [I]f you show me a brain scan in and of itself, I can tell you virtually nothing about the

function of that person." *Id.* at 99. The scans "tell us location, but they don't tell us function." *Id.* at 100. Dr. Upson said that even if the SPECT scan showed an abnormality in the brain, the psychological tests might not find anything wrong with that person's brain function. *Id.* at 102.

Dr. Lipman, "a neuropharmacologist," said that his speciality deals with "understanding of the effects of drugs on the brain, nerve-brain behavior." *Id.* at 112, 115. Although Dr. Lipman said that he recommended "that a certain type of brain scanning be done," and said that it would have been "helpful in furtherance of [his] evaluation," he did not identify the brain scan to which he referred. *Id.* at 150-151. It is clear that there are many types of brain scans, including EEG, CAT, and MRI scans in addition to the new comers, PET and SPECT. *See* RR 97-99. Dr. Lipman's failure to identify which scan he was referring to renders his testimony on the issue of obtaining a brain scan on Robinson of no significant value.[11]

Moreover, testimony that a SPECT scan would have been "helpful" in further documenting findings does not entitle Robinson to relief. To support his claim to the contrary, he relies on *Hoskins v. State*, 702 So.2d 202 (Fla. 1997). In *Hoskins*, the defendant wanted a PET scan, a test which Robinson told the trial

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[11]This is particularly true considering that Robinson, at various points, indicated he wanted a PET scan and an MRI. *See* RR 52-53, 97.

judge is quite different and does not get the same results as a SPECT scan.[12] (RR 53). Hoskins' expert testified that "the test was **necessary** for him to render a more precise opinion . . .." 702 So.2d at 208 (emphasis added). This Court remanded, ordering that a PET scan be performed and that if the result of that test caused the mental health expert to change his testimony, the defendant would be entitled to a new penalty phase proceeding. *Id.* at 210.

The evidence in the instant case was not that a SPECT scan was necessary, but only that it would have been "helpful." There was no suggestion that Dr. Upson's testimony might have changed as a result of the test, but only that the test results might have further corroborated his testified-to opinion. (RR 108). There was not even this much offered as to the effect any SPECT scan would have had on the neuropharmacologist's testimony.

Further, according to the defense's own assertions to the trial judge, the SPECT scan is very different than a PET scan and does not provide the in-depth, technological precision of the PET scan which the *Hoskins*' expert deemed "necessary." There was no testimony that the SPECT scan was necessary in Robinson's case, and the State submits that a brain scan less detailed and technologically precise than the PET scan is not necessary to a

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[12]Defense Counsel explained to Judge Russell that the PET scan differs from the SPECT scan in that "the P.E.T. scan . . . like a C.A.T. scan, [is] very technological, very detailed, very precise, very sensitive, several hours." (RR 53).

mitigation expert's determination of functional brain damage.[13]

Robinson's claims in his appellate brief that the "$500.00 test . . . would have provided **concrete evidence** . . . of Robinson's brain damage" (IB at 35 emphasis in original) and that it "would have proven the extent of his brain damage" (IB at 35) are soundly refuted by the **defense** experts. Dr. Upson said that even if the SPECT scan showed an anatomical deficiency, there might be nothing wrong with the brain's functioning. (RR 96, 99, 100, 102). According to Robinson's own expert, such a test cannot provide concrete evidence of functional brain damage, much less prove the extent of it.

Robinson has not shown that the trial judge abused her discretion in refusing to order the late-requested SPECT scan. Robinson has had numerous tests and has been examined by several well-qualified psychological experts. The results of those tests and examinations show that any brain damage Robinson has is not such as to excuse or significantly mitigate his conduct in murdering Jane Silvia. The requested SPECT scan **might** have showed an area of brain damage, but it would not have showed how that damage affected Robinson. Dr. Upson testified regarding any functional, as distinguished from physical, brain damage which Robinson had and how it affected him. A test to physically coorborate what was said to functionally exist was not necessary,

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[13]Moreover, the State submits that even the PET scan is not necessary to such a determination because it cannot pass the *Frye* test. The *Frye* issue was not raised, or considered, in *Hoskins*.

and therefore, the failure to order it cannot constitute an abuse of judicial discretion.

Whether brain damage functionally existed was the only real concern; as Dr. Upson testified, a brain scan might well reveal physical brain damage in a person with no functional damage resulting therefrom. Certainly, such a scan would not "have provided **concrete evidence**" of the type of brain damage which could be mitigating in nature. Afterall, the physical fact of brain damage is irrelevant; it is only if the brain damage affects the defendant's ability to function that it may be considered mitigating in nature. Dr. Upson's testimony regarding Robinson's functional brain damage was sufficient to apprise the trial court of the only relevant matter at issue, i.e., functional brain damage. Thus, the instant case is readily distinguishable from *Hoskins*, and no relief is warranted.

Finally, it should be noted that the prosecutor objected to the SPECT scan because it did not meet the *Frye* test. That test requires that "the thing from which the deduction is made must be sufficiency established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). There was no showing that the SPECT scan meets the *Frye* test. Indeed, Robinson ignored the issue altogether.

Although the *Frye* objection was made at the June 11, 1997 hearing, (RR 56), Robinson did not address it then, or at any

subsequent hearing, including the July 1st hearing at which the SPECT scan was denied. Judge Russell made it clear that the failure to meet the *Frye* test was of concern to her. She stated: "[I]f there's any reason to believe that this one is not recognized as a scientifically accepted test in the community, I don't want to go there." (RR 7). Still, Robinson offered nothing on the *Frye* issue at that time, or even at the July 24th hearing at which his experts testified. Having utterly failed to address the *Frye* issue, which was of obvious concern to the State and the trial judge, Robinson should not now be heard to complain that he did not get the scan which he has not shown to meet the *Frye* test.

POINT III

THE TRIAL JUDGE DID NOT PREJUDGE ROBINSON'S PENALTY PROCEEDING.

Robinson complains that Judge Russell's "repeated comments on the record, as well as the denial of additional funds for mitigation" demonstrate that she had prejudged the penalty phase proceeding. (IB at 39). Specifically, he complains that the judge was concerned with "'getting it right this time,'" "saving the county money," and avoiding a second reversal. *Id.* at 40.

The truth is that Judge Russell was very concerned that she "look at them [the mitigators] a lot harder this time." (1SR 11). She emphasized that she did not "want to handicap him [Robinson] in anyway." *Id.* at 13. She proposed to keep Robinson in town so he would have more opportunity to speak with his attorneys regarding the investigation and presentation of mitigation. *Id.* When Robinson expressed his strong desire to return to death row, Judge Russell agreed, after securing Defense Counsels' assurance that they would communicate with their client at the prison, and entered the appropriate order. *Id.* at 14-15, 17, 18.

Robinson also complains that the judge was "anxious to complete" the proceeding and implies that she was biased toward any defense matters which might have resulted in a delay. (IB at 41, 42). If Judge Russell was concerned about the time, it was rightly so. This Honorable Court's November 21st order on remand gave the

trial judge 60 days in which to hold the penalty phase proceeding. At the end of the January 17, 1997 hearing, the penalty phase proceeding was scheduled for February 13th. *Id.* at 18. Due to the defense obtaining two extensions of time from this Court, the penalty phase proceeding was not held until July 24th - more than **six months** after the initial 60 day period ordered by this Court.[14]

Robinson also complains that Judge Russell showed bias against him by refusing to give him all of the funds he wanted for mitigation. (IB at 50). The judge at the March 4, 1997 hearing in this case noted that Judge Russell had given Robinson more money than customary for payment of his mitigation expert, Dr. Berland. (1SR 24-25). That judge refused to authorize the higher amount, *Id.* at 29, and proceeded to set a cap of $5,000 for Robinson's additional mitigation expert. *Id.* at 33.

A month later, Robinson informed Judge Russell that Dr. Berlin "was not going to be able to get the work done within this time frame" and asked for appointment of Dr. Upson who "assured . . . he can have the work done . . .." *Id.* at 39. Despite Dr. Berlin having already completed "a certain amount of work," Judge Russell went over the County's funds guideline (the first time she had ever exceeded those guidelines) and granted the motion agreeing to pay Dr. Upson considerably more than was usual and customary. *Id.*

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[14]The first extension resulted in the penalty phase being set for mid June, and the second extension resulted in the July 24th date.

Five weeks later, the defense informed the judge that it had exceeded the $5,000 cap and needed $11,000 to pay the costs of one of its mitigation experts and expected to need an additional $4,000. (2SR 102). The defense had exceeded the cap previously set by Judge Russell without any authority whatsoever. In addition, the defense now wanted another expert, Dr. Lipman. It was in this context that Judge Russell said: "My God, that's two doctors" when asked to approve Dr. Lipman. *Id.* at 87. Actually, as the Judge later noted, Dr. Lipman was the fourth defense mitigation expert: "We've got three doctors, four counting Berlin . . .." *Id.* at 99. The fact that this Honorable Court had given a time deadline worked in the defense's favor as Judge Russell granted motions for more monies and more personnel as a result of that time pressure. *See Id.* at 99.

Finally, Robinson complains that Judge Russell "expressed surprise that the mitigation specialist had already spent approximately 240 hours investigating . . . and anticipated 'no more than' 125 additional hours . . .." (IB at 43). That reference is to the mitigation expert who exceeded the court's order setting a $5,000 cap "over double without any authority to do that" and also claimed to need another $4,000. (2SR 102, 106). Judge Russell could not even get a straight answer regarding what this expert had done and "what physically she's got to do." *Id.* The most Defense Counsel offered was to "reschedule this for next week so that I can be better prepared to argue exactly what we need . .

.." *Id.* at 107. Judge Russell was understandably frustrated when she responded: "There goes some more time. If that's what you have to do, I just don't get it. It seems like a lot of hours for what's happening here and a lot of people working on it." *Id.* Indeed, the judge's comment: "I think we're going a little far on this case," *id.* at 108, seems rather restrained in light of the relevant circumstances.

One thing seems clear, this Honorable Court believed that 60 days would be adequate time in which to hold the penalty phase. In making that determination, this Court knew, from the first penalty phase proffer, of virtually all of the mitigation evidence which was ultimately presented. Due to defense maneouvering, more than **four times** as much time as this Court originally allotted to conduct the penalty phase passed before the hearing was finally held. Under such circumstances, there was no bias or prejudice in Judge Russell's question: "[H]ow long does it take?" *See* IB at 47.

Although Robinson complains on appeal that Judge Russell entered "rulings denying additional funds for mitigation investigation," (IB at 50), he does not identify any specific denials. The State submits that with the possible exception of the SPECT scan, there were none. Robinson got all of the experts he asked for and got more monies to pay them with than are ordinarily allotted in Orange County. In fact, he got more from Judge Russell than the other Orange County judge was willing to award. Under these circumstances, it is absurd to claim that Judge Russell

showed a bias against Robinson by denying him funds for mitigation investigation!

Robinson also complains that Judge Russell was concerned about "'getting it right this time.'" Certainly, any trial judge should be concerned with correcting on remand the mistakes identified by this Honorable Court in its opinion vacating that judge's decision. Having such a concern is hardly a basis for criticism of the judge. To the contrary, had Judge Russell not had such a concern, Robinson may well have had a basis to raise a legitimate charge of bias against him. The number of hearings, the amount of money and people afforded to the defense, and the painstakingly detailed sentencing order all show that Judge Russell not only set out to do it right this time, she impressively accomplished her goal.

"[D]ue process under Florida's capital sentencing procedure requires a trial judge who is not precommitted to a life sentence or a death sentence but rather is committed to impartially weighing aggravating and mitigating circumstances." *Porter v. State*, No. 90,101, slip op. at 7 (Fla. Oct. 15, 1998). Robinson has cited nothing in the record showing that Judge Russell was precommitted to a death sentence. Indeed, the record shows otherwise; she said that she would carefully consider all of the mitigation, and her lengthy sentencing order makes it quite clear that she did so. The case law is replete with examples of death sentences handed down by trial judges and upheld by this Honorable Court where three aggravators were weighed against even substantial nonstatutory mitigation. *See* Point IV, *infra*. Robinson was accorded everything

to which he was entitled, and more, and his instant charge of bias and prejudice against him is wholly without merit.

POINT IV

ROBINSON'S SENTENCE OF DEATH IS PROPORTIONATE.

Robinson complains that his death sentence is disproportionate. (IB at 52). He claims that the three aggravators "in light of the plethora of mitigating factors" when validly weighed reveals that death is not appropriate. Id. He proceeds to argue to this Honorable Court that his "case falls into the `alcohol haze' genre," and therefore, he does not qualify for a death sentence. Id. at 56. He cites Kramer v. State, 619 So.2d 274 (Fla. 1993) and three other cases in support of his alleged "alcohol haze" exception to the death penalty statute.

In *Kramer*, this Court said:

> While substantial competent evidence supports a jury finding of premeditation here, the case goes little beyond that point. The evidence in its worst light suggests nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk.

619 So.2d at 278. In light of these circumstances, this Court found **two** aggravators insufficient to proportionately support the death sentence.

In the instant case, there is no evidence that Robinson or his victim, Jane, were alcoholics, or were legally drunk or otherwise intoxicated. Indeed, Robinson indicated that he had not had illegal drugs on the day of the murder until after the crime. *See* OR 10. Certainly, there was no indication (or claim) that Jane, who was doing her best to get Robinson into a drug-treatment

program, had had any drugs. Moreover, the evidence of premeditation in this case went far beyond minimal premeditation and overwhelmingly established heightened premeditation. *See* Point VII, *infra*.

Neither does *Nibert v. State*, 574 So.2d 1059 (Fla. 1990), which Robinson cites, support his claim that he is entitled to a life sentence due to the alleged "alcohol haze" exceptions to the death penalty. In *Nibert*, **one** aggravator was deemed insufficient to sustain a death sentence when reviewed for proportionality where both the defendant and the victim had a history of drinking alcohol, Nibert had consumed large amounts of alcohol the day of the murder, significant amounts of alcohol had been consumed immediately before the murder, the victim's blood alcohol level was extremely high, and "Nibert was a child-abused, chronic alcoholic who lacked substantial control over his behavior when he drank," and "had been drinking heavily on the day of the murder; and . . . was drinking when he attacked the victim." 574 So.2d at 1063. This Court also noted that there was no evidence of robbery and that the murder weapon belonged to the victim, not the defendant. *Id.* at 1059. In light of these circumstances, this Court found the single aggravator insufficient to proportionately support the death sentence.

Again, the differences between the instant case and the cases Robinson cites are legion. Clearly, Jane was not an alcoholic or a drug addict, and she had not been drinking, or doing drugs, with

Robinson near the time of her murder. Robinson, who was not intoxicated, and was feeling no effects of the cocaine he had taken "days" earlier, (OR 10), carefully formed a plan to murder Jane and proceeded to carry it out. The murder weapons belonged to Robinson, not Jane, and one of the reasons Robinson killed Jane was to rob her of money which she had in her shoes. Robinson purposefully did not give Jane the information which might have warned her that she was in danger from him. *See* OR 15. Further, after he killed Jane, he carefully bound and concealed her body, and took it to a wooded location where he buried it. He burned the couch on which he killed her, and he performed other acts, including concocting an exculpatory story explaining Jane's murder - all of which indicate that Robinson was in control and not in an "alcohol haze" as appellate counsel now claims.

Thus, the instant case is not comparable to *Kramer* or *Nibert*, or to any of the cases on which Robinson relies. Both *Knowles v. State*, 632 So.2d 62 (Fla. 1993) and *White v. State*, 616 So.2d 21 (Fla. 1993) were single aggravator cases where the defendant was extremely intoxicated at the time of the murders. Further, there are no "bizarre circumstances" surrounding Jane's murder as there were in *Knowles*; Robinson carefully planned and executed Jane's murder for the specific and well thought out purposes of avoiding arrest and obtaining desired funds.

Robinson proceeds to ask this Honorable Court to reweigh the aggravators and mitigators and consider others not found by the

trial court. For example, he claims that Jane's murder "was not `heinous atrocious, or cruel'" and argues that that factor should be considered in deciding whether Robinson should die for her murder. (IB at 58). The State points out that although the HAC aggravator was not sought, there was enough evidence to support it had the prosecutor chosen to pursue it. The facts of this case clearly show that the brutal, bludgeoning, stabbing death was heinous, atrocious, and cruel. As the trial court noted, Robinson stabbed Jane after clobbering her three times with a hammer because she was making so much noise he was afraid the neighbors would hear. Thus, even if it was appropriate for this Court to consider the absence of a particular aggravator in mitigation, which it is not, Robinson's claim that Jane's murder was not HAC is simply belied by the evidence.[15]

Likewise, Robinson claims that this Court should consider that the prior violent felony aggravator was not found in his case. (IB at 58). Like the HAC claim, such a claim was not made in the trial court, and is therefore, inappropriate on appeal. *See Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982).

Neither does Robinson's attempt to weaken the heightened

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[15]Apparently, the prosecutor did not pursue the HAC aggravator because there was no conclusive evidence regarding whether Jane was conscious when so savagely attacked and killed by Robinson. However, the evidence that Jane was still alive after being beaten with the hammer and repeatedly stabbed is clear and would have supported that aggravator. *See Willacy v. State*, 696 So.2d 693, 696 n.8 (Fla. 1997). Thus, that Robinson received a windfall in the failure to pursue the HAC aggravator does nothing to mitigate his crime, or the sentence he has justly received therefor.

premeditation prong of the cold, calculated, premeditated aggravator militate in favor of a life sentence. He claims that it is entitled to less weight because he was "binging on crack cocaine in the months prior to the murder."[16] *Id.* Again, this claim was not made below. Further, the State points out that the trial judge considered the cocaine use in the only permissible manner, as part of the nonstatutory mitigation found and weighed by the trial court. To use the same facts in the manner proposed by Robinson is impermissible bootstrapping.

Robinson next asks this Court to find his death sentence disproportionate because he "decided shortly after his arrest that he deserved to die for the murder of his girlfriend." (IB at 58). This appears to be a thinly disguised "domestic violence exception to the death penalty" claim. This Court has flatly rejected such a claim and should likewise reject this one. *See Spencer v. State*, 691 So.2d 1062, 1065 (Fla. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997)["[T]his Court has never approved a `domestic dispute' exception to imposition of the death penalty."].

Moreover, Robinson's claim that his confession should not be used to support the aggravators found by the trial court because it was self-serving is without merit. With the possible exception of

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[16]This claim is inconsistent with Robinson's statement to Judge Russell, indicating that he had not had cocaine for "days" prior to the murder, and that he was not feeling the effects of cocaine at the time of the murder. (OR 10).

Robinson's last minute claim that contrary to his several earlier statements, robbing Jane of the money she kept in her shoe was not one of the reasons he murdered her, he has not retracted a single thing he said in his several confessions. Repeatedly, he has admitted murdering Jane and has described in detail the manner in which he did so and his motivation in so doing. To discount a confession because it is self-serving where the confessor still does not claim that the confession was false would be the height of injustice.

It is within the trial court's discretion to determine whether evidence offered in mitigation has been established. *Foster v. State*, 679 So.2d 747, 755 (Fla. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1259, 137 L.Ed.2d 338 (1997). Likewise, "[t]he weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard." *Blanco v. State*, No. 85,118, slip op. at 4 (Fla. Sept. 18, 1997)(*citing Campbell v. State*, 571 So.2d 415, 420 (Fla. 1990)). Such "discretion is abused only where no reasonable man would take the view adopted by the court." *Huff v. State*, 569 So.2d 1247, 1249 (Fla. 1990). Certainly, "a trial court's decision will not be reversed because an appellant reaches the opposite conclusion." *Foster*, 679 So.2d at 756. Robinson's instant "proportionality" claim is in reality no more than an attempt to lure this Court into violating the foregoing precedent.

Indeed, he finally comes right out and says it: "[T]he trial

court failed to find unrefuted, valid mitigation and erred in her consideration of the mitigating evidence that she did find." (IB at 59). To support this claim, however, he states only that Judge Russell "did not seem to understand the tremendous impact that brain damage **can** have on an individual." *Id.* He does not even assert that **he** was so brain damaged, or that it had such an impact on him, causing him to murder Jane. He opines instead that he presented "unrefuted proof that both statutory mental mitigators were present" in his case, although he does not deign to explain what proof he refers to. (IB at 60).

In *Bruno v. State*, 574 So.2d 76 (Fla. 1991), this Court emphasized that the trial judge has the discretion to reject the testimony of a defense mental state expert in regard to the statutory mitigators. 574 So.2d at 82. In *Bruno*, a psychiatrist testified "that Bruno's drug abuse had left him with some brain damage." *Id.* The doctor also opined that Bruno was "extremely mentally or emotionally disturbed." *Id.* Noting that "it is undisputed that Bruno had a long history of drug abuse," this Court held that the trial judge "had discretion to discount much of [the doctor's] opinion." *Id.*

In addition, this Court noted that:

> Bruno testified at length in the penalty phase, and the judge had an opportunity to evaluate his mental capacity. Despite this use of drugs, Bruno had worked as a member of a band and thereafter as a mechanic. He articulately endeavored to try to exonerate himself of blame for killing Merland who he described as a `nut shop.' His only reference to using drugs or intoxicants on the night

> of the murder was the statement that he drank a beer before going to Merlano's apartment.

Id. This Court upheld the trial judge's rejection of the statutory mitigators - committed while under the influence of extreme mental or emotional disturbance and unable to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct.

Likewise, the trial judge's rejection of those statutory mitigators in Robinson's case should be upheld. Defense expert, Dr. Upson, refused to testify that Robinson's capacity to conform his conduct to the requirements of the law was substantially affected. (RR 77). While Dr. Lipman felt that Robinson was so impaired, (RR 161), he admitted that his opinion was based on Robinson's self-serving report of his symptoms. (RR 168, 173). He also conceded that Dr. Upson's opinion, based at it was on extensive psychological testing, was superior to his own. *Id.* Thus, the trial court was well within her discretion in determining that the statutory mitigators did not exist.

Like the judge in *Bruno*, Judge Russell observed Robinson personally relate, not once, but thrice, the grisly details of his brutal murder of Jane Silvia, the theft of her property, the concealment of her body, and the trip to buy drugs **after** the murder. In addition, she saw Robinson appear and address her at many other hearings and was impressed with his intelligence, comportment, and ability to express himself to the court. (RR 336). Clearly, Judge Russell had ample opportunity to evaluate

Robinson's mental capacity, and she specifically commented upon it: "The Defendant at every appearance has appeared rational, competent, well spoken, well groomed, intelligent, and focused." *Id.*

Moreover, like Bruno, Robinson had initially endeavored to try to exonerate himself of blame for Jane's killing. He first told a story about five drug dealers who had broken in and killed Jane. (OR 112). Further, despite his drug addiction, Robinson was employed. (OR 10-11). Finally, there was no indication that Robinson had used drugs or intoxicants on the night of the murder until after he killed Jane. Indeed, he told Judge Russell that he had not had any drugs for "days" before the crime, and that he was not suffering the effects of cocaine when he murdered Jane. (OR 10).

Robinson has utterly failed to show that Judge Russell abused her discretion in ruling that no statutory mitigators existed. Neither has he demonstrated any error in regard to the court's finding, and weighing, of the nonstatutory mitigation. Thus, Robinson's complaints about the trial court's finding, and weighing, of aggravators and mitigators entitle him to no relief.

Robinson's death sentence is clearly proportionate. In cases similar to the instant one, this Honorable Court has upheld the death penalty. For example:

(A) *Spencer v. State*, 691 So.2d 1062 (Fla. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997): **Two**

aggravators - prior violent felony based on contemporaneous convictions and HAC. 691 So.2d at 1063. Many mitigators, including two statutory mitigators - that the murder was committed under the influence of extreme mental or emotional disturbance, the capacity to appreciate the criminality of his conduct or conform it to the law was substantially impaired and numerous nonstatutory mitigators "including drug and alcohol abuse, paranoid personality disorder, sexual abuse by his father, honorable military record, good employment record, and ability to function in a structured environment . . .." *Id.* This Court said the trial judge had discretion to "not ascribe great weight" to the two statutory mitigators where the evidence showed the defendant could "function in his job and . . . plan and carry out his wife's murder." *Id.* at 1065.

(B) *Mordenti v. State*, 630 So.2d 1080 (Fla. 1994): **Two** aggravators - pecuniary gain and CCP. Eight nonstatutory mitigators, including the defendant's age, no history of prior criminal activity, death of his father when the defendant was young, abandonment by his mother, he was a good stepson, he supported his girlfriend and her children, he was "a thoughtful friend and employer and was fair in business dealings," and he was well behaved in court. 630 So.2d at 1083. This Court soundly rejected Mordenti's claim that "the death penalty is disproportionate . . . given the heavy mitigation, the limited number of aggravating factors . . .," and that his less culpable

codefendant "received complete immunity." *Id.* at 1085.

(C) *Geralds v. State*, 674 So.2d 96 (Fla. 1996): Three aggravators - committed during robbery, HAC, and CCP. One statutory mitigator - age of the defendant, and several nonstatutory mitigators, including bad upbringing and antisocial and bipolar, manic personality.

(D) *Foster v. State*, 654 So.2d 112 (Fla. 1995): Three aggravators - committed during robbery, HAC, and CCP. 14 nonstatutory mitigators, including, but not limited to: Under the influence of mental or emotional disturbance, capacity to appreciate the criminality of his conduct or conform it to the requirements of the law was impaired, abusive family background, alcohol and drug addiction, physical injuries, learning disabilities, and remorse.

While all of the above cases support the conclusion that Robinson's death sentence is proportionate, comparison with *Spencer* renders any other conclusion entirely unjust. Spencer had two aggravators whereas Robinson has three; Spencer had two statutory mitigators whereas Robinson has none; Spencer's nonstatutory mitigation is very similar to Robinson's, including drug abuse and personality disorders. Like Spencer, Robinson functioned well on a daily basis, he held a job (actually several jobs), (OR 10-11), and he carefully planned, and carried out, his girlfriend's execution. As Robinson, himself, has recognized, he well deserves the death sentence he has received, and neither proportionality,

nor any other legal concept, justifies a different result.

POINT V

THE TRIAL COURT DID NOT ERR IN FINDING THE AGGRAVATING FACTOR - COMMITTED FOR PECUNIARY GAIN.

This issue is not properly before this Honorable Court. In *Robinson v. State*, 684 So.2d 175 (Fla. 1996), this Court determined that the State proved this aggravator beyond a reasonable doubt. 684 So.2d at 180 n.1,6. An issue raised in a defendant's original appeal on which no error was found may not be raised again on appeal at a subsequent penalty phase proceeding. *Spencer v. State*, 691 So.2d 1062, 1064 (Fla. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997). This rule applies specifically to aggravating factors. *Id.* Thus, this issue should not be further considered by this Court.

Assuming *arguendo* that this issue is properly before this Court, Robinson is entitled to no relief. As this Court stated in *Willacy v. State*, 696 So.2d 693, 695 (Fla. 1997):

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. Rather, our task . . . is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

The State contends that the trial court applied the right rule of law regarding the pecuniary gain aggravator, and the evidence supporting the finding of that aggravator far exceeds the

"competent substantial evidence" threshold.

Florida law makes the subject aggravator applicable where the murder "was committed for pecuniary gain." Fla. Stat. Sec. 921.141(5)(f) (1995).

> [T]o establish this aggravator the state must prove beyond a reasonable doubt only that `the murder was motivated, at least in part, by a desire to obtain money, property or other financial gain.'

Hildwin v. State, No. 89,658, slip op. at 3 (Fla. Sept. 10, 1998)(*quoting Finney v. State*, 660 So.2d 674, 680 (Fla. 1995)) (emphasis in *Hildwin*). Robinson asserts that despite his several confessions to the effect that one reason he murdered Jane was to get the money she had in her shoes, the pecuniary gain aggravator was not proved. He claims that because he wanted to get the death penalty after killing Jane and until shortly before his second penalty phase proceeding, he was motivated to lie about the reason why he killed her. He claims that he knew that saying that he killed her, in part, for the money would insure that he got the death penalty.[17]

Now, he no longer wants the death penalty. Now, he says that taking the money was not a reason he killed her. Which self-serving statement is to be believed? The trial judge was the one charged with answering that question, and her answer, as finder of

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[17]It is interesting to note that Robinson emphasized and reemphasized facts that might weaken the liklihood of an HAC finding, to-wit: Whether Jane was conscious during the brutal murder. This rather undercuts the defense claim that he was trying to accumulate aggravators when admitting to killing Jane, in part, to steal money from her.

fact, is final and binding on this, and every other, court.

In a well written order, Judge Russell rejects Robinson's new claim and sets out why she believes it is false. It is important to remember that it was Judge Russell who observed Robinson both times he addressed the court and explained why he killed Jane Silvia. It was she who heard both stories Robinson told and who also heard the tape recorded confession and observed Detective Griffin testify regarding the taking of that confession. It was she, as trier of fact, who decided between the competing stories and issued her decision as a matter of fact. Her determination in that regard cannot be disturbed on appeal.

Robinson does not claim that even if Judge Russell's factual determination is accepted, he does not qualify for the pecuniary gain aggravator. The closest he comes to making such a frivolous claim is the comment that "a defendant's confession does not necessarily carry the State's burden of proof." (IB at 63). Certainly, the repeated confession in the instant case was more than sufficient to establish the aggravator beyond a reasonable doubt.

Moreover, Robinson has consistently admitted, and continues to admit, that he took the money from Jane's shoe after he killed her, and that he bought cocaine with it immediately after the murder. "[T]he circumstances of [the defendant's] activities both before and after the murder" are to be considered in determining the existence of the pecuniary gain aggravator. *Hildwin v. State*, No. 89,658, slip op. at 3 (Fla. Sept. 10, 1998). Thus, the unrecanted

confession of his actions before and immediately after he murdered Jane provide substantial competent evidence that the murder was motivated by pecuniary gain.

In *Finney v. State*, 660 So.2d 674, 680 (Fla. 1995), the defendant claimed that he took his victim's VCR and other property as "an afterthought" after killing her. Noting that the record showed that Finney had pawned the VCR "within hours of the murder," his challenge to the pecuniary gain aggravator was unsuccessful. 660 So. 2d at 680.

In *Bruno v. State*, 574 So.2d 76, 80 (Fla. 1991), the "afterthought" claim was rejected because evidence as much as a month before the murder indicated that the defendant wanted property of the kind he took from his victim after the murder. *In* Bruno,

> One month prior to the murder Bruno asked Steve Mizella if he could use his car to borrow a bunch of stereo equipment. On the night of the killing, Bruno borrowed Mizella's car and said he was going `[t]o get stereo equipment.' While at Merlano's apartment he was admiring the stereo just prior to hitting Merlano over the head with a crowbar.

Id.

Laying aside Robinson's repeated confessions that one reason he killed Jane was to take the money, there was ample evidence that the theft was not an afterthought. Robinson's mother testified that shortly before the date of the murder, she had sent money for the retrieval of Jane's property, but Robinson had used it to buy

drugs.[18] (RR 339). *See* RR 211. On the night of the murder, Robinson not only knew that Jane had the money, he knew exactly where she was keeping it. (OR 239). Further, in his statement to Detective Griffin, Robinson admits that he killed Jane to avoid a physical fight with her. (OR 239). He also admits that he took the money from her shoes immediately after killing her, and used it to purchase drugs within hours of the murder. *Id.* This evidence was sufficient to dispel any claim that Robinson took the money from Jane as an afterthought.

Finally, in *Lawrence v. State*, 691 So.2d 1068 (Fla. 1997), a witness testified that the defendant told her that he planned to commit a robbery in the future. Later, Lawrence told her that he entered a convenience store to rob it. 691 So.2d at 1075. However, Lawrence also told her that "he did not go through with the robbery." *Id.* "[T]he State presented evidence demonstrating that the cash register was open and empty when police arrived at the murder scene and that $58 was missing . . .." *Id.* This Court concluded that "this evidence, when considered in combination, supports beyond a reasonable doubt that the murder was committed for pecuniary gain." *Id.*

Thus, it is clear that Robinson's late claim that the theft was not a reason for Jane's murder is wholly insufficient to defeat the pecuniary gain aggravator, just as Lawrence's claim that he did

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[18]Further, Robinson admitted stealing things from his mother and her boyfriend and using them to obtain drugs. *See* RR 75.

not take the money after earlier statements indicating to the contrary was insufficient. Robinson's several prior statements to the effect that the theft was a reason he killed Jane, coupled with his history of using other people's things (including money sent to redeem Jane's possessions), to get drugs, that he knew Jane had the money and where she kept it, and that he took the money from Jane's shoes and used it to buy drugs immediately after murdering her, supports beyond any reasonable doubt that he murdered Jane for pecuniary gain.

POINT VI

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COMMITTED TO AVOID A LAWFUL ARREST.

This issue is not properly before this Honorable Court. In *Robinson v. State*, 684 So.2d 175 (Fla. 1996), this Court already determined that the State proved this aggravator beyond a reasonable doubt. 684 So.2d at 180 n.1,6. An issue raised in a defendant's original appeal on which no error was found may not be raised again on appeal at a subsequent penalty phase proceeding. *Spencer v. State*, 691 So.2d 1062, 1064 (Fla. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997). This rule applies specifically to aggravating factors. *Id.* Thus, this issue should not be further considered by this Court.

Assuming *arguendo* that this issue is properly before this Court, Robinson is entitled to no relief. As Judge Russell wrote in her detailed sentencing order on remand, Robinson "freely admits he killed Jane Silvia to prevent her from prosecuting the theft of her TV's, microwave, and VCR." (RR 338-339). Robinson "knew that a law violation would cause him to be returned to prison to complete his sentence. He wanted to avoid this at <u>any</u> cost." *Id.* (emphasis in original). Judge Russell concluded: "[A]voiding arrest and prison was very definitely the dominant reason." *Id.*

Robinson has consistently maintained that he killed Jane to avoid arrest and imprisonment. He told his mother so prior to his

arrest, he told Detective Griffin that after his arrest, he told his experts the same, and he told Judge Russell that at both penalty phase proceedings. (OR 12-14, 240; RR 76, 235). In fact, at the second penalty phase proceeding, Robinson repeatedly stressed that the dominant reason he killed Jane was to avoid arrest, to-wit: "Jane died . . . because I didn't want to go to prison." (RR 235).

As this Court stated in *Willacy v. State*, 696 So.2d 693, 695 (Fla. 1997):

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. Rather, our task . . . is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

The State contends that the trial court applied the right rule of law regarding the avoid arrest aggravator, and the evidence supporting the finding of that aggravator far exceeds the "competent substantial evidence" threshold.

Florida law makes the subject aggravator applicable where the murder "was committed for the purpose of avoiding or preventing a lawful arrest . . .." Fla. Stat. Sec. 921.145(5)(e) (1995).

> [T]he evidence must prove that the sole or dominant motive for killing was to eliminate a witness. [A] motive to eliminate a potential witness to an antecedent crime can provide the basis for this aggravating circumstance. . . . And, it is not necessary that an arrest be imminent at the time of the murder.

(Citations omitted) *Consalvo v. State*, 697 So.2d 805, 819 (Fla. 1996). Clearly, Robinson's repeated admissions that he killed Jane

sufficient to support the trial court's finding of the avoid arrest aggravator. *Consalvo*.

In *Willacy*, the defendant sought to have the avoid arrest aggravator invalidated on appeal. This Court found competent substantial evidence to support the trial judge's finding based on Willacy having bludgeoned his victim and then tied her, rendering her "no immediate threat." 696 So.2d at 696. Concluding that Willacy had "little reason to kill her except to eliminate her as a witness [as] she was his next door neighbor and could identify him easily and credibly both to police and in court," this Court upheld the finding of the avoid arrest aggravator. *Id.*

In the instant case, Jane was clearly no immediate threat to Robinson when he killed her. She did not know that Robinson was not going to be able to get her equipment back and was asleep when Robinson struck the first blow. He savagely beat-in the brain of the woman he "loved," and with whom he had had no argument, with a drywall hammer, and then because she was making too much noise, he repeatedly stabbed her in the throat and chest with a turkey carving knife. As the trial judge in *Willacy* did, Judge Russell stated in her sentencing order that Robinson's dominant motive in murdering Jane was "avoiding arrest and prison." (RR 339). Thus, the trial court's order finding the avoid arrest aggravator should be affirmed.

POINT VII

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

This issue is not properly before this Honorable Court. In *Robinson v. State*, 684 So.2d 175 (Fla. 1996), this Court already determined that the State proved this aggravator beyond a reasonable doubt. 684 So.2d at 180 n.1,6. An issue raised in a defendant's original appeal on which no error was found may not be raised again on appeal at a subsequent penalty phase proceeding. *Spencer v. State*, 691 So.2d 1062, 1064 (Fla. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 213, 139 L.Ed.2d 148 (1997). This rule applies specifically to aggravating factors. *Id.* Thus, this issue should not be further considered by this Court.

Assuming *arguendo* that this issue is properly before this Court, Robinson is entitled to no relief. Robinson claims that the trial judge erred in finding that the cold, calculated, and premeditated aggravator [hereinafter "CCP"] was proved because "the requisite heightened premeditation is absent." (IB at 71, 72). He claims that "[i]t is just as reasonable a construction of the evidence that Robinson was vacillating in his decision to kill Silvia." (IB at 73). Finally, he claims that "mental problems would not permit him to form the requisite `heightened premeditation.'" (IB at 73).

As this Court stated in *Willacy v. State*, 696 So.2d 693, 695

(Fla. 1997):

> [I]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt--that is the trial court's job. Rather, our task . . . is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.

The State contends that the trial court applied the right rule of law regarding the CCP aggravator, and the evidence supporting the finding of that aggravator far exceeds the "competent substantial evidence" threshold.

Florida law makes the subject aggravator applicable where the murder "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Fla. Stat. Sec. 921.141(5)(I) (1995). This Honorable Court set out the elements of CCP and defined each in *Jackson v. State*, 704 So.2d 500, 504 (Fla. 1997).

(1) "Cold" - "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage;"

(2) "Calculated" - "a careful plan or prearranged design;"

(3) "Premeditated" - "the defendant exhibited heightened premeditation;" and,

(4) "No pretense of moral or legal justification."

704 So.2d at 504. Clearly, the undisputed facts of the instant case show that Robinson's murder of Jane met all elements of the CCP aggravator.

In *Jackson*, the defendant alleged "a loss of emotional control" as a result of becoming "outraged by her predicament." *Id.* Noting that shortly before the crime, she "appeared calm" and "was able to devise a plan to catch [the victim] off guard," this Court concluded that there was competent, substantial evidence to support the trial judge's finding of the "cold" element. *Id.* Jackson's activity before the murder was not of the type "performed by a person in a frightened or panicked state." *Id.*

In the instant case, Robinson also appeared calm. He testified that he and Jane had not argued before he killed her and that she lay down and went to sleep in his presence. Further, he thought about what he was about to do and then proceeded to follow his plan. Although he claims that at some point during his contemplation of Jane's murder, he was "nervous and shaking" for "a little while" and that he was "kind of scared about what I was fixing to do," (OR 232), same does not describe a person in a seriously frightened or panicked state. Further, he said that he felt this way "cause I'd never done anything like this before." *Id.* That he was a little nervous about the performance of his first execution is not the type of loss of emotional control which might avoid the "cold" label. It is clear from his description of the manner in which he laid, and followed, his plan that he calmly and coolly reflected on the murder before committing it. The "cold" element is clearly met.

In *Jackson*, this Court found substantial competent evidence

establishing the "calculation" element in that "Jackson carefully planned the murder," she sat with the victim while he busied himself with paperwork, then went to her apartment, got a gun and put it into her waistband, returned to the victim's car and began rummaging through his papers, she struck the victim discovering his bulletproof vest, and then dropped her keys so she could shoot the victim in the head when he bent over to retrieve them.

After Robinson learned that he would not be able to get Jane's electronic equipment back from the drug dealer he had given it to, he returned to his home with Jane. They ate, and "[s]he, uh, fell asleep on the couch." (OR 231). At that point, Robinson

> went out to my truck and I had a long handled, steel handled, uh, uh, drywall hammer. . . . I went out and retrieved that from the...behind my seat of the truck and . . . she... I think she's stirring a little bit as I came back in . . .. I took the hammer wrapped in clothes into my bedroom and laid it down, and I came back in and got me a little drink of water or something, sat in front of the couch where Jane was lying. I waited for her to go back to sleep. Uh, after I realized that, . . . she was uh, sleeping soundly[,] I went back in and got the hammer, came back and laid in front of 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, put the hammer, went around . . . it (sic) was enough space there for a man to stand in between the wall and the couch. I stood there and hit her in the head with the hammer, uh, one time. She didn't move for a minute and then she....uh, her body raised up and as it did, I hit her again in the top of the head. The hammer went through the skull. . . . Both times. . . . All times. Every time I hit her, it went through her skull. Uh, her body kept moving and I . . . as the body raised up, blood came out the mouth. The body was still breathing and...and the heart was still beating, I'm sure. Uh, I think the third time...I hit her once and she raised up. I hit her a second time, she laid there for a few minutes and her body raised up again. **I wanted to make sure she wasn't**

> **conscious**, so I turned the hammer around for the claw part and stuck it through her head. Uh, and when we recover that, you'll still see it. There's matter in the claw of the hammer . . . being from Jane Silvia's body tissue. . . . You understand, the breathing and there was blood coming out of her mouth. Uh, and it was making gurgling sounds, right? At that point, **I was worried about a neighbor hearing** cause the walls are real thin and...it wasn't really a lot of sound. It sounded like maybe putting a hammer to a watermelon, like I stated before. Uh, anyway, so at that point, I have a serrated butcher knife, about 18" long. Like a turkey...turkey carving knife? . . . Something like that. It's not...maybe it's not quite 18." Uh, it's a good 12." I stuck it down through her, the soft part of her throat, down into her chest to try to stop the heart and the breathing **so that the noise would stop**. Which I believe I did successfully.

(OR 233-234) (emphasis added). Robinson proceeded to recount how he carefully wrapped and tied Jane's body, concealed it, burned the couch on which he had killed her, burned her identification and her shoes, and disposed of her body. (OR 234). Thereafter, when first questioned by officers, Robinson claimed that five drug dealers had entered his apartment and killed Jane. (OR 112).

In the instant case, it is clear that like Jackson, Robinson carefully planned the murder. He sat by Jane until she went to sleep, and then he returned to his truck and retrieved the hammer which he concealed in clothing before carrying it into the apartment. Inside, he hid the hammer in a room adjacent to that in which Jane lay. Then, he returned to sit by Jane until he believed she was sound asleep, at which time he retrieved his hammer, and circled around Jane until he found a suitable position from which to deliver the blows. He began bashing her head in with the hammer, and continued with the hammer, and then with a knife, until

he accomplished the deed he had so carefully planned - Jane's murder. Thereafter, he followed through with his plan to conceal the crime and avoid prison, even concocting a story to explain her murder should it become necessary or expedient. Like the victim in *Jackson*, Jane did nothing to provoke or cause the defendant's actions. Rather, her execution was part of a careful plan to kill and avoid arrest. Certainly, there was more than substantial competent evidence establishing the "calculation" element.

In *Jackson*, this Court found substantial competent evidence of heightened premeditation in the "deliberate and conscious choice to shoot" the victim. 704 So.2d at 505. Pointing out that "Jackson could have left the scene, but instead she purposely returned to confront" the victim, this Court said "Jackson did not act on the spur of the moment, but rather acted out the plan she had conceived during the extended period in which these events occurred." *Id.*

In the instant case, as the facts recounted hereinabove demonstrate, Robinson made a deliberate and conscious choice to kill Jane. As his expert at resentencing admitted, Robinson could have left the scene rather than murder Jane, but he chose not to. (RR 159-160). Indeed, Robinson, himself, admitted that "it was all unnecessary," and he could have left or talked Jane out of pressing the theft charges. (OR 237; RR 234). Like Jackson, Robinson clearly did not act on the spur of the moment, but rather acted out the plan he conceived well before the first death blow was

delivered.[20]

Robinson claims on appeal that his unspecified "mental problems" prevented him from forming heightened premeditation. The foregoing clearly discredits such a position. Moreover, the defense expert, Dr. Upson, testified that Robinson was not insane when he killed Jane, and he knew the difference between right and wrong. (RR 81). He had no diagnosis of any mental disorder applicable to Robinson "other than the drug abuse." (RR 83). Indeed, the only diagnosis was some unspecified personality disorder and drug abuse-dependence. (RR 83). Dr. Upson said that Robinson was not "psychotic" and has no cocaine psychosis. (RR 87). After extensive testing, Dr. Upson determined that Robinson has a high average I.Q., (RR 87), and an impairment index of .3 which could well be normal. (RR 92, 95-96, 110). At the very most, he has the possibility of mild brain damage.[21] (RR 92-93). Indeed, Dr. Upson testified that even if Robinson has some brain damage, and it is located in the suspected region of the brain, even after all of the functional damage tests he has done on Robinson, he still does not know how that would have affected his

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[20]Indeed, the fact that Robinson had not told Jane she would not be getting her property back indicates that he planned to kill her even before returning home. Clearly, there is no record support for Robinson's appellate claim that he "reached the actual decision to kill seconds before he committed the act." (IB at 73).

[21]Dr. Upson said that he did not know whether there was any brain damage, and if so, how any such damage had affected Robinson's behavior. (RR 96).

behavior.[22] (RR 105). Thus, the State submits that there was no credible evidence presented which established that Robinson had any "mental problems," much less ones of such magnitude that they prevented him from forming the heightened premeditation which his own, repeated description of the events preceding, during, and following Jane's murder clearly shows.

Defense expert, Dr. Lipman, testified that while any brain dysfunction Robinson has could interfere with his daily life, "it wouldn't be of a degree that would necessarily keep him from functioning in normal, everyday society." (RR 150). Although Dr. Lipman described Robinson's premeditation as "a very compulsive premeditation," (RR 156), he also testified that Robinson had "other alternatives" to killing Jane. (RR 159). For example, he could have left the area, even the country, or he could have recruited "the . . . continued support of the victim," (RR 159-160), as Robinson, himself, admitted. (OR 237; RR 234).

Robinson makes no claim that there was any shred of moral or legal justification for Jane's brutal murder. Indeed, any such claim would be patently frivolous. All Jane was guilty of was trying to help the man. As Robinson's mother said: "There's no excuse for what he did." (RR 210). Thus, there was substantial competent evidence establishing this element of the CCP aggravator, as well.

Finally, it is important to remember that Robinson spoke at

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[22]Neither would a SPECT scan have provided that information. (RR 87, 100).

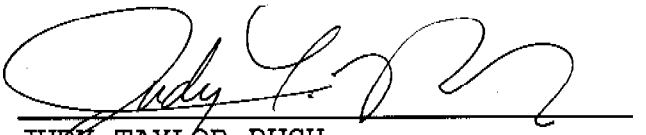
length with Judge Russell during both penalty phase proceedings and at many other hearings. She had the opportunity to evaluate Robinson's mental capacity. *See Bruno v. State*, 574 So.2d 76, 83 (Fla. 1991). She stated on the record that based on everything she had observed of Robinson during those proceedings, he appeared competent and of high intelligence. (RR 336). She added that when describing the murder to her, Robinson did so "in a matter-of-fact manner with no emotion." (RR 341-342). Even when he described the sound of the hammer bashing in Jane's skull as being "like a watermelon," and "blood gurgling from her mouth," he did so "with no emotion." (RR 342). Judge Russell concluded that this man murdered Jane Silvia in a cold, calculated, and premeditated manner. In so doing, she applied the correct rule of law regarding the CCP aggravator, and there is competent, substantial evidence to support her determination that the aggravator exists in this case. Thus, this Honorable Court should affirm the trial judge's finding of the CCP aggravator.

CONCLUSION

Based upon the arguments and authorities presented hrein, the judgment and sentence of the trial court should be affirmed in all respects.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL



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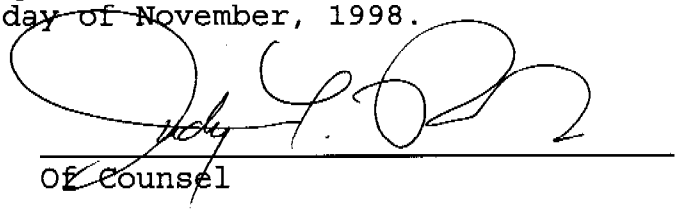
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to Christopher S. Quarles, Assistant Public Defender, 112-A Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 16th day of November, 1998.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

MICHAEL L. ROBINSON,

Appellant,

v. CASE NO. 91,317

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO ANSWER BRIEF OF APPELLEE

A. Dr. Berland's Report of January 24, 1995

B. Dr. Kirkland's Report of February 7, 1995