IN THE SUPREME COURT OF FLORIDA

MICHAEL L. ROBINSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 91, 317

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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
CHIEF, CAPITAL APPEALS
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

IN THE SUPREME COURT OF FLORIDA

MICHAEL L. ROBINSON, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 91,317

PRELIMINARY STATEMENT

This is Appellant's second direct appeal following this Court's remand for a new penalty phase. Robinson v. State, 684 So.2d 175 (Fla. 1996). On April 8, 1998, this Court granted appellant's motion to utilize the record of the previous direct appeal. Counsel will refer to the record on appeal in this particular case (Florida Supreme Court #91, 317) using the symbol (RA) citing the appropriate page and volume number. Robinson's prior record on appeal (Florida Supreme Court #85, 605) will be referred to using the symbol (RB) with the appropriate page and volume number. In referring to volume, counsel will use "SR" when designating a volume of the supplemental records.

STATEMENT OF THE CASE

When this case was initially before the trial court in 1995, Michael Robinson pled guilty to the first-degree murder of Jane Silvia. Prior to the plea colloquy, appellant's counsel explained that appellant did not wish to proceed to trial, did not wish to present any defense, did not want his attorneys to file any motions on his behalf, and did not want to present any mitigation at the penalty phase. Appellant expressed that he desired to die and was "seeking the death penalty in this case." Robinson v. State, 684 So.2d 175 (Fla. 1996); (RB 1-39, Vol. 1). Prior to the plea, defense counsel pointed out that certain defenses could be raised and that this case is "not necessarily a death penalty case." (RB 6, Vol. 1) The trial court conducted a plea colloquy. (RB 18, Vol. 1) The state set forth a factual basis on the record. (RB 18-22, Vol. 1)

When the trial court sentenced Michael Robinson to death in 1995, she found three aggravating circumstances: (1) the capital felony was committed for the purposes of avoiding or preventing an unlawful arrest[1] ; (2) the capital felony was committed for pecuniary gain[2] ;and (3) the capital felony was committed in a cold, calculating, and premeditated murder without any pretense of moral or legal

---

[1]§921.141 (5)(e), Fla. Stat.(1995)

[2]§921.141 (5)(f), Fla. Stat. (1995)

justification.[3] The trial court concluded that the aggravating circumstances could not be outweighed by any potential mitigating circumstances and sentenced appellant to death. (RB 102-109, Vol. 3; 257-62, Vol. 4)

Following a direct appeal, this Court vacated Robinson's death sentence based on the trial court's failure to consider valid mitigating evidence contained in the record. The trial court was required to do so despite appellant's request to ignore the mitigation and in spite of his assertion that he wanted to die. Robinson v. State, 684 So.2d 175 (Fla. 1996).

On remand, Michael Robinson ultimately decided that he did not want to die in Florida's electric chair.[4] The trial court granted Appellant's motion to appoint a mitigation expert and set a cap of $5,000.00 "without further order of this Court." (RA 288-89, 292 Vol.4) The trial court also granted appellant's motion to retain an expert for a mental status examination, also with a $5,000.00 cap. (RA 290-91, 293, Vol. 4) Ultimately, Dr. Berland, the mental health expert used at the first penalty phase had scheduling problems. The trial court subsequently appointed Dr. Upson. (RA 294-96, Vol. 4)

---

[3] §921.141(5)(i), Fla. Stat. (1995)

[4] Actually, Robinson decided not to thwart the process on remand and allowed Florida's capital sentencing scheme to work as it was designed, i.e., the development of mitigation to be weighed against the aggravating circumstances. (RA 232-33, Vol. 2)

On May 23, 1997, appellant filed a motion for a positron emission tomography (PET) scan. (RA 299, Vol.4) When the cost of a PET scan seemed too onerous, defense counsel subsequently requested a single photon emission computed tomography (SPECT) scan, a test he termed a "poor man's" PET scan. (RA 102-4, 110-12, SR-Vol. 6) Appellant also sought to exceed the previously set cap for payment to experts for the development of statutory and non-statutory mitigation. (RA 302-4, Vol. 4; 79-114, SR-Vol.6) Following an additional hearing on both of these two issues, the trial court denied the motion to exceed the cap and refused to grant additional funds for mitigation investigation. (RA 44-74, SR Vol. 4; 308 Vol.4) On July 1, 1997, following a hearing, the trial court reversed its prior decision and denied appellant's motion for single photon emission computed tomography (SPECT) scan. (RA 1-14, Vol. 1; 311, Vol. 4)

On July 24, 1997, the trial court conducted a penalty phase without benefit of a jury pursuant to this Court's mandate. (RA 15-256, Vol. 2) At the commencement of the penalty phase, the trial court summarily denied appellant's motion to withdraw his previously entered plea of guilty. (RA 17-18, Vol. 2)

At the penalty phase, the state called Detective Griffin who played the audio tape of appellant's confession to the crime. (RA 30-33, Vol. 2) Appellant called two mental health professionals and his own mother to testify on his behalf. (RA

34-219, Vol.2) The state ended the evidence with a statement from the victim's brother. (RA 220-23, Vol.2)

On August 15, 1997, the trial court adjudicated appellant guilty of murder in the first degree and sentenced Michael Robinson to die in Florida's electric chair. (RA 257-64, Vol. 3; 219-24, Vol. 4) The trial court entered a sentencing order finding the same three aggravating factors found the first time. The trial court also found extensive mitigation on remand, but concluded that the three aggravating factors outweighed the mitigating circumstances. (RA 334-62 , Vol. 4)

Appellant filed a timely notice of appeal on August 22, 1997. (RA 366, Vol.4) This Court has jurisdiction. Art. V, Section 3 (b)(1), Fla. Const. This brief follows.

STATEMENT OF THE FACTS

On July 25, 1994, Jane Silvia (Robinson's girlfriend) did not report for work. An investigation revealed Michael Robinson to be a suspect. Under police questioning, Robinson initially told detectives that five drug dealers had entered the apartment he shared with Silvia and murdered her. On August 16, Robinson contacted Detective Griffin and admitted his guilt. Robinson explained that several days before the murder, he stole Silvia's VCR, television, and microwave and traded them for drugs. (RB 18-19, Vol. 1) Silvia had reported the theft to police but did not press charges at the time. (RB 13, Vol. 1) Silvia hoped that Robinson would return her property and everything would work out. Police said that she had seven days to call back and initiate charges. (RB 13, Vol. 1; RB 238-40, Vol. 4; State Exhibit # 1) The couple attempted to retrieve the property but it had already been sold. (RB 19, Vol. 1)

After their futile attempt to retrieve Silvia's property, the couple returned to the apartment, and Jane Silvia went to sleep on the couch. Robinson went out to his truck and got a drywall hammer. Robinson returned to the apartment and watched Silvia sleep, thinking about what he was going to do. Robinson then hit Silvia in the head with the hammer as she slept. The hammer went through Silvia's skull. (RB 19-20, Vol. 1) Robinson hit her a second time. He then hit

her a third time using the claw end of the hammer. (RB 20, Vol. 1) In an effort to stop her heart, Robinson stabbed Silvia through the neck with a knife. Robinson then left the apartment and went to Cocoa Beach. He returned later, retrieved the body, and buried it near Apopka Boulevard in Orange County. The autopsy revealed that Silvia died as a result of skull fractures and brain injury due to blunt force trauma to the head. At the deposition, the medical examiner concluded that the first blow would have rendered Silvia unconscious and she undoubtedly suffered no pain. (RB 20-22, Vol. 1)

Robinson confessed to Detective Griffin that he loved Jane very much and that he deserved the death penalty for killing her. In an addendum to the interview, Robinson explained that his own mother had sent them some money to retrieve Silvia's electronic equipment. (RB 63-65, Vol. 2) Silvia was keeping the money in her shoes for safekeeping. Robinson gratuitously told Detective Griffin:

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

(RB 65, Vol. 2) Robinson added that the "other reason" was to prevent Silvia from calling the police to press charges on the theft of her electronic equipment. (RB 65-66, Vol. 2)

Mitigating Evidence

Dr. Upson, a clinical and neuropsychologist tested Robinson. He found Robinson's left brain to be a "little weaker than we expect...relative to the right brain." (RA 45, Vol. 2) Dr. Upson began looking into Robinson's history to see if he could find data to indicate any brain impairment. Dr. Upson determined Robinson's brain had some kind of damage; it was not normal. The damage could have been recent as a result of his extensive use of drugs. (RA 63, Vol. 2)

Robinson's uncle gave him vodka at the age of eight beginning his life long history of substance abuse. As a teenager, Robinson smoked marijuana and experimented with LSD. (RA 68, Vol. 2) An examination of Robinson's history revealed numerous incidents where brain damage could have occurred. Due to a difficult delivery, Robinson's birth was assisted by forceps. Additionally, at the age of three, Robinson suffered internal bleeding resulting in a loss of consciousness and hospitalization. When Michael was six years old, he almost drowned in a swimming pool, again suffering oxygen deprivation and unconsciousness. (RA 63-66, Vol. 2) At the age of six, Robinson was diagnosed as suffering from attention deficit disorder and was placed on high doses of Ritalin. (RA 66, Vol. 2) In his twenties, Robinson was the victim of an industrial accident caused by toxic paint fumes. He was convulsing and unconscious and

was hospitalized as a result. (RA 70-71, Vol. 2) As an adult, a car hit Robinson as he rode a bicycle resulting in yet another head injury. (RA 79, Vol. 2)

Michael's father disowned him at the age of fourteen. He became a ward of the state. (RA 69, Vol. 2) Robinson began a fairly consistent pattern of the consumption of large amounts of cocaine on a regular basis. (RA 70, Vol. 2)

Dr. Upson diagnosed polysubstance abuse, cocaine dependence and a personality disorder not otherwise specified. (RA 83, Vol. 2) Dr. Upson's professional opinion was that Robinson was under the influence of extreme mental or emotional stress at the time of the murder. (RA 75, Vol.2) Upson also concluded that Robinson's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.[5] Dr. Upson also opined that Robinson acted under extreme duress when he committed the murder. (RA 77-78, Vol. 2) Upson explained that Robinson had been raped four times in prison during prior incarcerations. Under the circumstances, the pressure to avoid a return to prison and additional rapes constituted extreme duress.

Dr. Jonathan Lipman, a neuropharmacologist, also testified at the penalty phase. Neuropharmacologist have special expertise in understanding the effects of

---

[5] Dr. Upson had a problem with the word "substantially" but testified that Robinson could not stop himself...he had no control." (RA 77, Vol. 2)

drugs on the brain and on behavior. (RA 112-15, Vol. 2) Dr. Lipman testified as to Robinson's extensive drug use throughout his life. Robinson still suffers from LSD flashbacks. (RA 120, Vol. 2) Robinson also used methamphetamine which, with chronic use, causes serious adverse effects which resemble a psychotic experience. (RA 122-23, Vol. 2) Dr. Lipman also explained that children who are prescribed Ritalin generally have a brain lesion which causes hyperactivity. The active ingredient in Ritalin actually slows down the hyperactivity in these abnormal brains.. However, given in large doses, Ritalin can have a toxic effect on some parts of the cortex causing sprouting of intracortical nerve fibers. (RA 121, Vol. 2)

When Michael Robinson married at the age of seventeen, his wife introduced him to the joys of intravenous drug use, specifically preludin, a stimulant, and dilaudid, an opiate. Using both together intravenously is called "speed-balling." (RA 128, Vol. 2) Robinson was also ingesting crystal methamphetamine in his teen years. (RA 128, Vol. 2) When Robinson was nineteen he stayed awake for an entire month while using cocaine intravenously. (RA 129, Vol. 2) Dr. Lipman described how heavy use of cocaine and amphetamines can result in psychosis as well as crippling depression. (RA 129-36, Vol. 2)

After being drug-free for several years, Robinson still exhibited abnormal behavior. Dr. Lipman described him as "quite paranoid", with compulsion in his thinking, compulsive behavior, and hyperreligiousity. (RA 140-42, Vol. 2) From this, Dr. Lipman termed it "very likely" that Robinson suffers from an organic problem in the temporal lobe of his brain, part of the limbic region. (RA 142, Vol. 2) While using drugs prior to the murder, Robinson experienced typical symptoms of chronic cocaine psychosis. (RA 143-49, Vol. 2) Cocaine reacts with brain damage resulting in a magnification of abnormal behavior. (RA 149, Vol. 2) Dr. Lipman suspected that Michael Robinson suffered from brain damage. (RA 149-50, Vol. 2) Lipman concluded that, "at the time of the offense, Robinson was clearly suffering in a state of unreality brought about by the chronic effect of cocaine, specifically chronic cocaine psychosis." (RA 153, Vol. 2)

Lipman also concluded that Robinson's ability to conform his conduct to the requirements of law was substantially impaired. "He felt compelled to commit this offense. ...very compulsive, that he was driven, that he felt that he had to do this, that he felt that he had no choice. ...He didn't want it to happen, but he described the most profound compulsion." (RA 155, Vol. 2) Dr. Lipman concluded that at the time of the murder, Robinson was under the influence of extreme mental or emotional disturbance, that he acted under extreme duress

(subjectively perceived), and that his ability to control his behavior was substantially impaired given the compulsion that he felt. (RA 158-61, Vol. 2)

Robinson's mother, Barbara Judy, confirmed the myriad incidents in Michael's life that could have resulted in brain damage. She also corroborated his lengthy history of drug addiction and substance abuse. She also explained Robinson's abnormal life and dysfunctional family including the family's history of mental illness, drug addiction, and abuse. (RA 174-219, Vol. 2)

SUMMARY OF THE ARGUMENTS

Following reversal of appellant's death sentence on direct appeal, Michael Robinson was not so anxious to use Florida's court system to commit suicide. The trial court should have granted Robinson's timely motion to withdraw his plea based on his representation that the plea was not intelligent and voluntary. Certainly the trial court's summary denial of the motion without a hearing or argument violated Robinson's fundamental right to due process of law.

The trial court also committed reversible error when the court suddenly decided that "enough is enough" and refused to allow a brain scan to be conducted on Robinson. The court's main reason for refusing to allow the test was based on concerns that it might lead to further delay. No medical tests were performed at all, only psychological ones. The court refused to order the test in spite of the fact that the only two mental health professionals involved in the case testified that a brain scan would have definitely aided in their evaluation of Robinson. This issue is directly controlled by this Court's decision in Hoskins v. State, 702 So.2d 202 (Fla. 1997). The prejudice is evident where the state argued and the trial court agreed that Robinson suffered from little or no brain damage and, whatever damage existed, did not necessarily "cause" Robinson to murder.

It is abundantly clear from the record that the trial court had prejudged this

case. Michael Robinson was to be sentenced to death again no matter what evidence the defense showed in mitigation. The trial court's repeated comments on the record reveal her bias. Her bias affected the rulings whereby the court denied additional funds for mitigation investigation and refused to order a brain scan. This also resulted in a deprivation of Robinson's constitutional rights to equal protection under the law.

The state failed to prove that the murder was committed for pecuniary gain. The evidence supporting this aggravating circumstance was gleaned from Robinson self-serving statement when he was attempting suicide by Florida's death sentencing scheme. The state also failed to prove the requisite "heightened premeditation" and that the murder was committed to eliminate a witness. Robinson's mental state caused by his drug addiction and crack cocaine use at the time of the murder made it impossible for him to think clearly enough to support these aggravators. A proper weighing of any valid aggravators against the substantial amount of mitigation proved by the defense on remand should result in a sentence of life without possibility of parole. This particular murder is not one of Florida's most aggravated and least mitigated.

ARGUMENTS

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

POINT I

THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA WHERE APPELLANT ORIGINALLY PLED GUILTY AND ASKED TO DIE, BUT ON REMAND DECIDED HE WANTED TO LIVE AFTER ALL, RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 2, 9, 16, 17, AND 21 OF THE FLORIDA CONSTITUTION.

As this Court remembers from appellant's prior direct appeal, Michael Robinson pled guilty to the first-degree murder of his girlfriend, Jane Silvia. Prior to the initial plea colloquy, trial counsel explained that Robinson did not wish to proceed to trial, did not wish to present any defense, did not want his attorneys to file any motions on his behalf, and did not want to present any mitigation at the penalty phase. Robinson expressed that he desired to die and was "seeking the

death penalty in this case." Robinson v. State, 684 So.2d 175 (Fla. 1996). Robinson waived his right to a penalty phase jury and proceeded to sentencing before the trial court. Relying on Koon v. Duger, 619 So.2d 246 (Fla. 1993), the defense proffered mitigating evidence which it had received from a psychologist, Dr. Berland, and appellant's mother. The trial court ultimately granted Michael Robinson's request and sentenced him to death. In doing so, the trial court disregarded valid mitigating evidence at appellant's urging. Id.

After this Court reversed Robinson's death sentence, Michael Robinson decided that he was not so anxious to die. On remand, Robinson cooperated with his lawyers who developed further mitigation and argued for a life sentence. In fact, appellant sought to withdraw his prior guilty plea as well. At the beginning of the new penalty phase on July 24, 1997, defense counsel announced:

> MR. BENDER (defense counsel): The second thing, your Honor, at this time I would make an ore tenus motion on behalf of Mr. Robinson to withdraw the previous plea that was rendered and would state that Mr. Robinson was not able to form an intelligent waiver of his rights and would ask that the case be--that Mr. Robinson be allowed to withdraw his previously entered plea on this charge and the case be reset for trial.
>
> MR. CULHAN (prosecutor): The state's response is, first of all, the motion has to be in writing. I don't think the grounds stated by the defense are enough to have the defendant withdraw the plea. I would ask the court to deny the motion to withdraw the plea.

> THE COURT: Additionally, I can remember the plea, where he told us why he did what he did and he appeared very confident to me. And I am denying the motion to withdraw the plea.
>
> Are you ready to proceed to the penalty phase?

(RA 17-18, Vol. 1)

The Motion to Withdraw the Plea was Timely.

Florida Rule of Criminal Procedure 3.170(f) provides, in part:

> The Court may in its discretion, and shall on good cause, **at any time before a sentence**, permit a plea of guilty to be withdrawn and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty.

(Emphasis added.) Coming as it did prior to sentencing, Robinson's motion to withdraw his plea was certainly a timely one. A motion to withdraw a plea made before sentencing results in "the governing principles [which] are to be liberally construed in favor of the defendant." Roberts v. State, 670 So.2d 1042, 1045 (Fla. 4th DCA 1996). "In any event, this rule should be liberally construed in favor of the defendant....**The law inclines toward a trial on the merits**; and where it appear that the interest of justice would be served, the defendant should be

permitted to withdraw his plea.[6] Yesnes v. State, 440 So.2d 628, 634 (Fla. 1st DCA 1983). (Emphasis added.) See also, State v. Braverman, 348 So.2d 1183 (Fla. 3rd DCA 1977).

No Requirement That the Motion be in Writing

Contrary to the prosecutor's assertion, there is **absolutely no requirement** that the motion be in writing. Florida Rule of Criminal Procedure 3.170(f) cites no such requirement. Florida Rule of Criminal Procedure 3.190(a) requires **pretrial motions** to be in writing, although that requirement may be waived for good cause shown. Robinson's motion to withdraw his plea could not be characterized as a pretrial motion under any sense of the term. In fact, appellate courts rule on the merits of issues involving oral motions such as this on a regular basis. See, e.g., Gunn v. State, 643 So.2d 677 (Fla. 4th DCA 1994) and Johnson v. State, 541 So.2d 1213 (Fla. 2d DCA 1989).

The Trial Court's Summary Treatment of Robinson's Attempt to Withdraw His Plea

The trial court's summary denial of appellant's timely motion to withdraw his guilty plea denied him fundamental due process. This case is on all fours with

---

[6] Analogously, the granting of a capital defendant's request to withdraw a valid waiver of a jury is within the sound discretion of the trial court. However that discretion should be exercised liberally in favor of granting a request to withdraw, **particularly a request to withdraw a prior waiver of a penalty phase jury**. Pangburn v. State, 661 So.2d 1182, 1189 (Fla. 1995).

Gunn v. State, 643 So.2d 677 (Fla. 4th DCA 1994). During the course of Gunn's trial, he changed his previously entered pleas and pled guilty. At the subsequent sentencing hearing, Gunn's attorney advised the court that Gunn had discussed with him "his second thoughts about entering this plea...." The court instructed defense counsel to make a motion to withdraw the plea if that was his intention. Defense counsel declined to do so, stating his confusion about Gunn's wishes. Gunn joined in and said that he "would like to make a motion to withdraw the plea" to which the trial court replied, "[m]otion denied." Gunn v. State, 643 So.2d at 678.

Despite the fact that Gunn's appellate counsel did not argue these specific grounds, a review of the transcript convinced the appellate court that Gunn was improperly cut off from attempting to argue his motion. As soon as Gunn stated that he wanted to make a motion to withdraw his pleas the court promptly stated, "[m]otion denied" and proceeded to sentencing.

> The trial court's abrupt ruling eliminated any chance for appellant to even attempt to show a cause basis for making his motion. Certainly, after hearing the trial judge's ruling on the motion, appellant and his counsel were not required to argue further with the court or on the motion. Therefore, as a matter of fundamental due process, Gunn should have been given the opportunity to present argument and be heard on the motion to withdraw his guilty pleas.

Gunn v. State, 643 So.2d at 678.

Robinson's trial court was not **quite** so abrupt. Defense counsel did state a legal basis, i.e., Robinson was not able to form an intelligent waiver of his rights. (RA 17, Vol. 2) After the prosecutor's two sentence response, the trial court stated that she remembered the plea, "where he told us why he did what he did and he appeared very confident to me." (RA 18, Vol. 2) The court then denied the motion and proceeded to the penalty phase. At the time Robinson made the motion, the trial judge never allowed counsel or Robinson to elaborate on the reason that the appellant was unable to form an intelligent waiver at the time of his plea.

The trial court's summary denial of appellant's motion to withdraw his plea was a violation of Robinson's fundamental right to due process of law. It was abundantly clear that no further discussion was necessary. Any additional attempts to argue the motion would have been futile. See, Williams v. State, Fla. L.Weekly D 1720, D1721 (Fla. 2nd DCA July 24, 1998) ["apparently ready to deny the motion even before it was made, the trial court preempted Williams' attorney and made the motion for him, denying it ... and tacitly making clear that further discussion would be frivolous."] See also, Estevez v. State, 705 So.2d 972 (Fla. 3rd DCA 1998)[trial court's refusal to all probationer's lawyer to make

closing argument prior to sentencing violated due process rights.] The trial court's abrupt ruling on Robinson's motion to withdraw his plea violated his rights to due process of law under both the state and federal constitutions. This Court should reverse and remand for a trial on the merits of this case. In the alternative, this Court should, remand for a hearing on Robinson's motion to withdraw his plea. See, Gunn v. State, 643 So. 2d 677 (Fla. 4th DCA 1994).

Robinson Clarifies the Motion to Withdraw the Plea After the Penalty Phase.

After the penalty phase ended, Robinson personally clarified (to some extent) the reasons he wanted to withdraw his plea. He admitted that initially, (shortly after the murder), he wanted to die because of his extreme remorse. By the time of the second penalty phase, he admitted that his:

> mind has cleared up a lot since then....I've been drug free for almost three years now....they give me drug tests randomly.....[RA 233, Vol.2]
> .... I wanted to withdraw the plea. You have denied that already. I gave that plea, again, I didn't want to give any chance of any other outcome happening except the death penalty.....the drug stuff I was going through that the doctors talked about, the reason I wanted to withdraw my plea was because I was under extreme duress....the depression of the fact that I killed my girlfriend. I wanted to die. I can't commit suicide because of my religion....

(RA 235-37, Vol. 2)

To prevail on a motion to withdraw a guilty plea, a defendant must

demonstrate prejudice or manifest injustice. Williams v. State, 316 So.2d 267 (Fla. 1975). Eckles v. State, 132 Fla. 526, 180 So. 764 (1938) held that the withdrawal of a guilty plea should not be denied in any case where it is the least evident that the ends of justice will be served by permitting a plea of not guilty in its place. Appellant contends on appeal that, in spite of the trial court's summary treatment of the issue, Michael Robinson managed to demonstrate good cause to justify the withdrawal of his guilty plea. His mind was still clouded with drugs at the time he entered the plea. He had been bingeing on crack cocaine for several months prior to the murder. (RA 71, Vol. 2) After the murder, he used the money in the apartment to buy more drugs. (RA 72, Vol. 2) [psychological and pharmacological testimony] A plea entered under the influence of drugs is subject to a motion to withdraw. See, e.g., State v. Reutter, 644 So.2d 564 (Fla. 2nd DCA 1994) and Campbell v. State, 488 So.2d 592 (Fla. 2d DCA 1986).

Aside from his drug-clouded mind, Robinson also mentioned his extreme depression after killing one of the few people in the world that cared about him. Due to religious scruples, he could not commit suicide, so he attempted to use Florida's court system to accomplish the deed for him. (RA 235-37, Vol. 2) As a result of Robinson's motivation to die, this Court should review his plea with great scrutiny. Robinson's state of mind infected the entire process the first time

he appeared before the trial court. It controlled his guilty plea and insistence on seeking a death sentence. The reliability of the entire process is called into question. See, e.g., Miller v. State, 23 Fla. L.Weekly S389, S390 (Fla. Supreme Court July 16, 1998) (Anstead, J. concurring.)[apparent from the face of the record that the penalty phase proceedings were fundamentally flawed. We can have no confidence in the outcome.]

This Court's Reversal of Appellant's Death Sentence in the Prior Direct Appeal Resulted in Robinson Losing the Benefit of his Plea Bargain

Robinson's entire motivation in pleading guilty was an attempt, indeed a successful one, to be sentenced to death. Even though the prosecutor and the trial court assured Robinson that pleading guilty would not guarantee a death sentence, Robinson knew that his refusal to cooperate with the development of mitigating evidence would **have** to result in a death sentence. (RB 25, 29-30, 32, Vol. 1) Once this Court reversed Robinson's essentially bargained for death sentence following the mandatory direct appeal, Robinson lost the benefit of his "bargain" and should have been allowed to withdraw his guilty plea. See, e.g., D.D.W. v. State, 686 So.2d 747 (Fla. 2d DCA 1997), State v. Battle, 661 So.2d 38 (Fla. 2nd DCA 1995); Thomas v. State, 327 So.2d 63 (Fla. 1st DCA 1976). While the usual case scenario is a defendant who received a sentence more harsh that he expected, this same logic should apply where a defendant like Robinson, desires the

maximum sentence. Under the circumstances, the trial court should have granted appellant's motion to withdraw his plea.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEUROLOGICAL TESTING WHICH WOULD HAVE PROVIDED MORE ACCURATE AND COMPLETE DATA ABOUT THE APPELLANT'S ORGANIC BRAIN DAMAGE, ENABLING THE DEFENSE EXPERTS TO REBUT AGGRAVATING CIRCUMSTANCES AND ESTABLISH MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE VIOLATIVE OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2, 9, 16, 17, AND 21 OF THE FLORIDA CONSTITUTION.

Once Michael Robinson decided that he was willing to die in prison rather than in Florida's electric chair, his lawyers had a duty to develop as much valid mitigating evidence as possible, something that Robinson prevented them from doing at his first penalty phase. In vacating Robinson's previous death sentence, this Court pointed out that the trial court had ignored valid mitigating evidence including, *inter alia*, that portion of the record that suggested that Robinson's mental functioning may have been impaired by several brain injuries. Robinson v. State, 684 So.2d 175, 180 (Fla. 1996).

> ...The PSI revealed that appellant may have suffered minor brain damage during birth; appellant was also in an industrial accident that left him oxygen deprived for

> nearly one hour; and, in 1992, he was hit and severely injured by an automobile while he was riding a bicycle. Dr. Berland's report corroborates these findings:
>
> > The defendant acknowledged an extensive history of incidents which might have contributed to impairment from brain injury, and in some of those instances, selectively endorsed some symptoms and denied others indicative of brain injury (suggesting the genuineness of his endorsements)....
>
> Additionally, Dr. Berland's interviews with Robinson's mother corroborated many of the events which may have contributed to his brain injury.

Id.

Following this Court's remand for a new penalty phase, defense counsel filed a motion for "Positron Emission Tomography Scan". (RA 299-Vol. IV) As grounds for the request, counsel cited Robinson's "extensive history of drug abuse and head injury." Additionally, the motion indicated that Dr. Upson, a court-appointed expert had recommended to counsel that Robinson undergo a PET scan to

> ...provide objective data for possible brain damage. The existence of documented brain damage would be relevant for penalty phase in terms of statutory and/or non-statutory mitigators.

(RA 299, Vol. IV) The motion was first discussed at a June 5, 1998 hearing on appellant's motion to exceed the previously set cap for mitigation investigation. (RA, SR Vol. 6)

> ...And we're also requesting a $500.00 PET scan for Mr. Robinson.
>
> THE COURT: What's that?
>
> MR. BENDER: It's actually a SPEC scan. Dr. Upson is requesting it. It can be done at approximately $500.00 cost. It is a specific positron emission tomography scan.
>
> THE COURT: What will that determine?
>
> MR. BENDER: Brain injury.

(RA 102-3, SR Vol. 6) The trial court initially agreed that the requested test was a reasonable expense.

> THE COURT: I can see getting the $500.00 test done. I can see that because that's something tangible, something I can understand maybe, and that's reasonable. And if that's what you have to do for today, I think that's fair.

(RA 110, SR Vol. 6) Near the end of the hearing, the trial court agreed to expend county funds to pay for the tests.

> MR. BENDER (Defense counsel): ...and the $500.00 on the PET scan, can we agree on that?
>
> THE COURT: Yes.

(RA 112, SR Vol. 6)

Subsequently at a June 11, 1997 hearing, scheduling problems were discussed. The trial court questioned defense counsel about their experts' progress.

> THE COURT: What's he [Dr. Upson] got to do? Is he the one that's going to do that medical test?
>
> MR. BENDER: The pharmacologist is Dr. Upson. The second (sic) scan needs to be set up and prepared.

(RA 47, SR Vol. 4)

> MR. BENDER: My understanding is Dr. Upson is ready with everything except the P.E.T. scan hasn't been done.
>
> THE COURT: Why hasn't it been done? He's been in this case for how long? ...he's been in it for a little over two months, and he hasn't done a P.E.T. scan. Why is that is so complicated with getting that done?
>
> MR. BENDER: It has to be approved, Judge. The state is opposed to it.

(RA 52, SR Vol. 4)

The prosecutor initially stated that his opposition to the test was that, "There's only one place in Florida that had one." (RA 52, SR Vol. 4) Defense counsel explained that he had switched from a PET scan (due to the cost of $20,000.00), to a SPECT scan which cost only $500.00. Additionally, there were

a number of facilities throughout Florida that could preform the cheaper test. Defense counsel explained that a SPECT scan was a "poor man's PET scan." (RA 52-53, SR Vol. 4) Even so, the cheaper test provided enough date to determine whether or not brain damage is present.

The state objected to either test, claiming that they were "experimental" tests which were not ready for forensic application. Additionally, the prosecutor stated that neuropsychologist are not qualified to interpret the test. Only radiologist and neurologist could effectively read and interpret the results. The state did concede that another judge in the circuit had admitted similar evidence in another capital case over his similar objection. (RA 53-56, SR Vol. 4)

Ultimately, the trial court stated that she did not "have a problem with a $500.00 test if it is going to tell us if there is any serious injury to the brain; but I don't know who you are going to have to read it...". (RA 58, SR Vol. 4) Further discussion revealed an understanding by both the state and the defense that a neurologist would read and interpret the test. Dr. Upson would consult with that neurologist in an attempt to determine the presence and extent of brain damage, if any. (RA 58-60, SR Vol.4)

Although the trial court pointed out that the test "has to get past these tests,

the Frye[7] test..." (RA 58, SR Vol. 4); the trial court appeared most concerned with any potential delay that the test might cause. (RA 61, SR Vol. 4) The court advised defense counsel that unless they got "an extension of time with the Supreme Court, doing a S.P.E.C.T. scan is a waste of time because nobody will be able to get that squared away. ...I want this over. I think he's had plenty of time." (RA 72, SR Vol. 4)

On July 1, 1997, an additional hearing was held on appellant's motion for a SPECT scan. (RA 1-14, Vol. 1) Appellant had successfully attained an extension of time from this Court. The penalty phase was set for July 24th and the SPECT scan was scheduled for July 14th at Shands Hospital in Gainesville. Defense counsel explained that a doctor at the hospital would read and interpret the results. Dr. Upson would consult with that doctor in an attempt to synthesize and pinpoint his diagnosis. (RA 2-3, Vol. 1) The prosecutor reiterated his objection that the test was "experimental" and claimed that there were only three experts in the United States that could refute it. (RA 4-5, Vol. 1) When the prosecutor questioned Dr. Upson's ability, as a neuropsychologist, to interpret a medical test such as a SPECT scan, defense counsel reiterated that Dr. Upson would be consulting with a neurologist who conducts, reads, and interprets the

---

[7] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

test. (RA 5-6, Vol. 1)

After a discussion of the number of psychological tests preformed by Dr. Upson on Mr. Robinson, the trial court stated:

> Well, if he's had that many kinds of tests, and I know he has had his, what's it, mitigation specialist, **he'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.
>
> **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 needed to make such a decision.** So I don't--even the $500.00 doesn't worry me. What worries me is the ramifications and the repercussions and the uncertainty of the test that we ultimately will get.
>
> We'll end up with, at best we will end up with a bunch of psychiatrist or psychologists or radiologist or some experts who are going to say yes, it's a good test; no, it's a bad test, doesn't mean anything. These people can't interpret it. I don't think throwing that much confusion in to this is going to help a case anymore. **You've got what I think is more than adequate in this case and I don't in this case, and I don't want to go any further.**

(RA 6-7, Vol. 1) (Emphasis added.) Defense counsel expressed concern about the trial court's prejudging of Robinson's fate and pointed out that Robinson had had no medical test preformed, only psychological ones. (RA 7-9, Vol. 1) The trial court responded:

> And I'm not going to go with this physical test. So we can cut our losses on that one. Anything else on this case?

(RA 9, Vol. 1) After this abrupt ruling, the trial court did agree to appoint Dr. Lipman, a neuropharmacologist. The case proceeded to a penalty phase July 24, 1997, following which the trial court sentenced Robinson to death.

Once again, the trial court's abrupt and unexpected ruling completely thwarted the ends of justice. The trial court suddenly decided, after initially indicating a favorable ruling and only weeks before the trial that would decide Robinson's fate, that additional testing **might** cause further delay and was completely unnecessary considering all of the testing already completed on Robinson. The trial court's ruling clearly violates appellant's rights under both the United States and Florida Constitutions to due process (the right to fundamental fairness, the right to present a defense, and the right to disclosure of favorable evidence); equal protection (with the respect to both the resources of the prosecution and/or non-indigent or non-incarcerated defendants), effective

assistance of counsel, to confrontation and compulsory process, and the rights to access the courts and the prohibition against cruel and unusual punishment which requires a reliable sentencing process through which the defendant can produce relevant and adequate mitigating evidence and can rebut aggravating circumstances presented by the prosecution. These rights are guaranteed by the Fifth, Sixth, Eighth, and Fourteenth to the United States Constitution, and Article I, §§2, 9, 16, 17, and 21, of the Florida Constitution.

This case is directly controlled by Hoskins v. State, 702 So.2d 202 (Fla. 1997). Hoskins' trial court denied a motion to transport Hoskins to Duval County for the purpose of having a PET scan. The Office of the Public Defender was willing to pay for the test and, Dr. Krop [a neuropsychologist] testified that the test was necessary for him to render a more precise opinion regarding Hoskins mental condition. Specifically, Dr. Krop stated that the neurological test would reveal the degree of impairment in the frontal lobe which is responsible for impulse control. The test would result in a more definitive and precise diagnosis.

The Hoskins trial judge denied the request for the PET scan, finding that it would be "highly suggestive at best." Hoskins v. State, 702 So.2d at 209. Hoskins' prosecutor put on no expert testimony (much like Robinson's prosecutor). Hoskins' prosecutor also argued that the PET scan was not

necessary, especially since Dr. Krop was a neuropsychologist rather than a physician. (Robinson's prosecutor argued almost precisely the same thing.) This Court held:

> Notably Dr. Krop was appointed by the trial court as an expert to assist in the preparation of Hoskins' defense. As indicated above, at the hearing on this issue Dr. Krop proffered that the PET Scan was necessary for him to render a more definitive opinion regarding Hoskins' mental condition, and he recommended that the test be performed. Additionally, as noted above, funds were available for the test. Under these circumstances, **we conclude that the trial judge abused his discretion in refusing to grant the test in light of the court-appointed expert's unrefuted statement that this particular test was necessary to the expert's proper evaluation of Hoskins. The fact that Dr. Krop is a neuropsychologist rather than a physician is irrelevant.**

Id. (Emphasis added.)

Dr. Upson performed psychological tests which indicated problems in the frontal-parietal-temporal, which was consistent with high cocaine use, demonstrated in the literature by SPECT scans. When asked directly if SPECT scan would have been helpful in this case, Dr. Upson replied, "Yes, it would have." (RA 74, Vol. 2) The only other mental health professional to testify at the penalty phase, Dr. Lipman, a neuropharmacologist testified that a brain scan

would have "absolutely" been helpful in the furtherance of his evaluation. (RA 150, 51, Vol. 2)

On cross-examination of both witnesses, the prosecutor attempted to establish the superfluousness of any type of brain scan in this case, but he failed to accomplish that goal. Both experts maintained that a brain scan would have been helpful in their evaluations of Michael Robinson and his suspected brain damage.

Robinson's trial court abused her discretion when she decided "enough was enough" and suddenly and unexpectedly denied appellant's request for a $500.00 test that would have provided **concrete evidence**, the type of evidence that the trial court wanted, "touch-feely stuff", of Robinson's brain damage.(RA 110, SR Vol. 6).

Amazingly enough, after denying Robinson the tool that would have proven the extent of his brain damage, the trial court had the temerity to question the extent of Robinson's brain damage as well as its relation to his behavior. The trial court wrote:

> ...he was of above-average intelligence, but he had indications of left temporal lobe brain injury. The left brain is a "little weaker..." [RA 343, Vol. 4] ...[discussing Robinson's forceps birth, incidents of head trauma and/or loss of conscientiousness] The doctors cannot say that any one of these circumstances affected his mental or

emotional status sufficiently to cause his criminal behavior. ...[RA 345, Vol. 4] **...There was evidence of some left temporal lobe damage (based on psychological tests), but Dr. Lipman said the amount of temporal damage does not appear to be of the degree that would keep him from functioning in normal, everyday society, and there is no evidence to the contrary**. ...Although [Dr. Upson] said he was not able to conform his conduct to the requirements of law, it is difficult to see why except that he was overcome by his addiction to drugs, ...[RA 346, Vol. 4] ...**What brain damage there is has not been proved to cause the Defendant to murder Jane.** ...[after discussing the numerous head injuries and losses of consciousness throughout his lifetime] **There is no evidence that any one of these injuries or a combination of them caused any permanent brain damage to the extent it would affect his behavior significantly.** ...Because he has **some** [emphasis in the original] frontal lobal damage, this mitigator [brain damage] is given a little weight as **there is insufficient evidence it caused the Defendant's conduct....** [RA 347-48 Vol. 1] ...In fact Dr. Upson said he could [emphasis in the original] have mild brain damage or he could [emphasis in the original] be normal. **If there were brain damage, he does not know how or if it would have affected his behavior**. The doctors also cannot say that any or a combination of his injuries could be responsible for his behavior. ...[RA 359, Vol. 4]...

(Emphasis supplied unless indicated otherwise.)

The trial court does not deserve all of the blame. The prosecutor had the audacity to argue that Robinson suffered from no brain damage at all.

> ...[W]hich could be mild brain damage or could be normal, depending on the circumstances.
>
> I don't believe that that has shown that he was under extreme mental or emotional disturbance, but that's an indication supposedly of brain damage. **We've had no other real indication of the possibility of brain damage.**
>
> And my argument addressed to these experts is simply two things: One, **we don't really know whether this was brain damage,** number one; and number two we absolutely don't know what difference it makes whether he has it or not.
>
> **If there had been brain damage, medical science is not to the point where we could tell what effect that would have had on his conduct.** Dr. Lipman seemed to think so...**they claim Michael Robinson suffers from brain damage due to birth trauma, illness and accidents with testing consistent with frontal lobe disfunction.**
>
> **We're not sure.** Dr. Upson told us that. ..**the results of his test indicate possible mild brain damage, but it could also be normal.** ...[RA 224-25 a, Vol. 2]
> ...**that he possibly maybe could have had brain damage, but we don't really know if he had.** ...[RA 231, Vol.2]

Actually, the prosecutor and the trial court both seemed to be focusing

inappropriately on the connection between Robinson's suspected brain damage and how this "caused" the murder. This reveals a basic misunderstanding of the law relating to mitigating evidence. See, e.g. Campbell v. State, 571 So.2d 415 (Fla. 1990). Brain damage, like a deprived and abusive childhood, is important evidence that mitigates against the imposition of the death penalty. The trial court abused its discretion in canceling the scheduled SPECT scan under these circumstances. Hoskins v. State, 702 So.2d 202 (Fla. 1997).

POINT III

ROBINSON'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE TRIAL COURT HAD PREJUDGED THE CASE AS EVIDENCED BY HER REPEATED COMMENTS ON THE RECORD, AS WELL AS THE DENIAL OF ADDITIONAL FUNDS FOR MITIGATION INVESTIGATION WHICH ALSO RESULTED IN A DENIAL OF APPELLANT'S CONSTITUTIONAL RIGHTS TO THE EQUAL PROTECTION CLAUSE GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

Perhaps Mr. Justice Black said it best:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said however, that "every procedure which would offer a possible temptation to the average man as a judge... not to hold the balance nice, clear, and true between the State and the accused denies the later due process of law." [citation omitted.] Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice

must satisfy the appearance of justice."

In re Murchison, 349 U.S. 133, 75 S.Ct. 63, 65(1955). The courts of this state are firmly committed to the proposition that the due process guarantee of a fair trial contains in its core the principle that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939). Appellant's submits that careful examination of the record on appeal in this case reveals that the trial court was not fair and impartial in deciding whether Michael Robinson would live or die.

From the outset, the trial court's major concern was "getting it right this time." Aside from saving the county money, the trial court did not want to be reversed by this Court once again. At the first hearing, Robinson seemed willing to be resentenced to death on the spot, but upon reflection, the trial court did not want to "mess up again." (RA 7, SR Vol. 1) "I can read the whole thing over again and set it for sentencing after I have considered the mitigators again. **Frankly, I did hear the mitigators** and I thought about them. **I didn't think they would do any good** but I will look at them a lot harder this time." (RA 11, SR Vol. 4)

> The only thing I read was that I didn't consider them. When in fact I went through all of them and wrote what they were and I made that one statement that I didn't

> consider them, which obviously I did. But I didn't see it as a problem that you didn't present enough. But if you want to present more, I wouldn't blame you.

(RA 15-16, SR Vol. 1) It is clear from this comment, that the trial court's mind was made up, before hearing any of the additional mitigating evidence that defense counsel would present. Appellant understands that Judge Russell was not automatically disqualified because she had previously sentenced Robinson to death in the same case. Spazinano v. State, 433 So.2d 508 (Fla. 1983). However, Robinson was entitled to an unbiased judge who had not already decided the outcome. Her comments, are reminiscent of the classic westerns where the sheriff said, "Let's give him a fair trial and **then** hang him."

It is abundantly clear from her numerous comments on the record, that the trial judge was anxious to complete the proceedings and was concerned only about expending county funds and avoiding another reversal by this Court. She also made repeated comments that Robinson's defense lawyers were "going to far" in their investigation of mitigating evidence. She repeatedly rebuffed their attempts to obtain more time, money, and evidence.

Some examples of the trial court's bias include her response to defense counsels' request for a continuance because their experts were not ready for trial, the court responded:

> And they asked for more money than they were awarded to start with too. I think they have gone too far with this. I don't think I am going to be granting any continuance in the case. ...He's entitled to fair representation. He's not entitled to perfection. He's already spent more money than somebody who can afford their own lawyer would spend. I think we're at the point where enough is enough.

(RA 45-46, SR Vol. 4)

> ...My first impression is, how much can you do? The guy has lived in a few places. He's gone to a few schools. He's had a few accidents. I mean, how many hours does it take to figure out all of that? That's where I have to read this to find out what in the world has taken so long.

(RA 69, SR Vol. 4)

Ultimately, defense counsel became concerned following the repeated comments by the trial judge which displayed a definite theme of prejudice. After the trial court refused to order the brain scan which had been already scheduled, defense counsel stated that he was troubled:

> ...because you are the person who will decide Mr. Robinson's fate here. ...When you've already precluded any possible additional testing, when you indicate that you feel all the testing that needs to be done has been done, I'm concerned because it seems you're shutting off any new

> possibilities of what we feel may be helpful in providing an answer as to what happened...

(RA 8, Vol. 1) The primary evil in having a judge who's impartiality might reasonably be questioned is not in the actual results of that judge's decision making. Rather it is the intolerable appearance of unfairness that such a circumstance imposes on the system of justice. The judicial system fails to present a plausible basis for respect when a judge's impartiality can reasonably be question. Goines v. State, 708 So.2d 656 (Fla. 4th DCA 1998).

Additional funds for the defense was a running theme throughout the proceedings. At the hearing on appellant's motion to exceed the previously set cap for mitigation investigation, the trial court expressed surprise that the mitigation specialist had already spent approximately 240 hours investigating Mr. Robinson's background and anticipated "no more than" 125 additional hours before the commencement of the penalty phase.[8] (RA 82-84, SR Vol. 6)

> THE COURT: I don't think you understand that we get letters about how

---

[8] The mitigation specialist explained that she was retained in mid March and the penalty phase was set for the middle of June. Investigation that normally occurred over a period of six months to a year was required in a very short period of time due to the time limitations placed on the litigants by the order of this Court. (RA 88-89, SR Vol. 6) The trial court acknowledged the difficulties created by this Court's order setting time constraints for the retrial. (RA 99, SR Vol. 6)

much we're spending on court-appointed attorneys by the month. So he's trying to protect your tax dollars and mine, and that's his job, and he should do that. And my main concern is what in the world is she doing for this many hours.

MR. BENDER: This is a death penalty case.

(RA 84, SR Vol. 6) In discussing the appointment of an additional mental health expert:

THE COURT: Now, you have also a Dr. Jonathan Lipman.

MR. BENDER: We are requesting he be appointed.

THE COURT: And you also have Dr. James Upson.

MR. BENDER: He's already been appointed.

THE COURT: What's Upson's --what is he doing?

MR. BENDER: He is a forensic neuropsychologist.

THE COURT: And what is Dr. Lipman?

MR. BENDER: He is a neuropharmacologist.

THE COURT: **My God, that's two doctors.**

(RA 87, SR Vol. 6) (Emphasis added.)

The trial court felt like she was between a "rock and a hard place" because:

> ...I know the Supreme Court wants you to do a good job, ...if I were to say, no, no mitigation expert, bam, its going to come right back on me. ...I just feel totally frustrated when we get into it knowing full well it will bounce back in a heart beat.

(RA 93, SR Vol. 6)

Although the county attorney made some noises about the escalating costs of trying a capital case, he ultimately left it to the trial court's discretion.

> MR. DORSETT (county attorney): But if the court believes that they need absolutely to have a cap increase to a certain amount, Orange County can only say the court is in the best position to judge that.

After acknowledging that Robinson had "some kind of brain injury" as well as a definite drug problem, the trial court stated:

> So how much more you have to find out, I don't know. every time he fell down the steps--if you had to know every time I fell down and hurt myself, you would be busy all day. Forever.

(RA 97, SR Vol. 6)

MR. DORSETT(county attorney):

> I don't mean to make this a long process, your Honor, if the court honestly believes, and I know the court honestly believes that if the court really believes that they need the extra money, fine, but we need to set a cap.

(RA 99, SR Vol. 6)

The trial court spoke wistfully about the money saved when Robinson pleaded guilty and "begged for the death penalty."

> The guy came in, begged for the death penalty, pled straight up with no jury. **It didn't cost us anything**. He begged for the death penalty, ...we got everything right until I did the order.

(RA 99-100, SR Vol. 6)

Defense counsel repeatedly pointed out that capital cases are expensive.

> ...this work is necessary in order for us to prepare and do our job because the state is seeking the death penalty. ...[RA 86, SR Vol. 6] ...I think if we look at the overall costs, ...after all the dust settles the amount of money we'll have to spend on this case would be rather small in comparison to the average death penalty case. ...comparing it to other cases and how much the county spends in Orange County on comparable case's, its not a lot. ...

(RA 101-2, SR Vol. 6) Defense counsel pointed out the complexity of investigating a capital defendant's history of accidents which may have resulted in

brain injury.

> Judge, there are about 16 incidents that we're trying to uncover from his birth to present date. That's not easily accumulated. Those records are very old. Many of them have been lost, destroyed, misplaced. It takes time to go back and accumulate and get a person's past.

(RA 106, SR Vol. 6) The trial court complained about the many hours of investigation as being unnecessary.

> Maybe by saying that we're just far exceeding what's reasonable. I think. I don't know. ...But it seems like a whole lot of money. This guy did have some injury, some head injury. I don't know where I read that, but I have seen it somewhere. And I've also seen that he--I know he's got a drug problem. Those are the two major things. I mean, how long does it take?

(RA 107-8, SR Vol. 6) By this statement, the trial court demonstrates a basic lack of understanding of mitigating evidence. The trial court later added:

> THE COURT: I think we're going a little far on this one. It just seems like an awful lot of money and time to investigate what I think you've got.
>
> MR. BENDER: I think we're talking over all 30, $35,000. That's not a lot of money for a death penalty case.
>
> * * * *

THE COURT: It's a lot of money for what has to be done. **Nothing but a penalty phase** or not even a penalty phase .

MR. BENDER: It's a lot of money, no question. ...but we're taking about the ultimate penalty... and that, I think, is not a lot of money when we're looking at another person's life.

THE COURT: **But if this person had money, let's say he could afford his own, I don't think he would be spending this much money and having two doctors and an expert mitigation specialist.**

MR. BENDER: I think they would. I think it would allow for more.

THE COURT: I don't know that they would...

(RA 108-9, SR Vol. 6)

The trial court seemed skeptical about the need to appoint Dr. Lipman:

MR. BENDER: There is a motion to appoint Dr. Lipman, Judge.

THE COURT: What for?

MR. BENDER: Well, he has to talk about the drug impact.

THE COURT: Can't the other guy? He's a doctor.

MR. BENDER: They are specialists, your

honor, and we know that. Dr. Lipman is a neuropharmacologist.

(RA 111, SR Vol. 6)

...I think the big problem I've got is how far do you go. How far, how many people. **You know, the guy admitted he killed the woman. We're trying to figure out what his problems were.**

MR. BENDER: We're talking about life or death here. ...We cannot present mitigation as we're suppose to do without the use of these experts and these people helping us.

THE COURT: **Perhaps there're digging too far. That may be the problem here.**

MR. BENDER: Well, then we get philosophical. How far is too far when a man's life is at steak? Do we just --

THE COURT: **I think we've hit it.**

(RA 112, SR Vol. 6)

While it is true that a defendant is not entitled to an infinite number of experts or to match the State's expenditures dollar for dollar, he is entitled to reasonable costs to investigate the case. Morgan v. State, 639 So.2d 6 (Fla. 1994). In a penalty phase, defense counsel has an ethical and professional responsibility to fully and completely investigate valid mitigation. See, e.g., Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994). Failure to provide the necessary funds for

the adequate defense of a criminal case may constitute reversible error. See, e.g., Cade v. State, 658 So. 2d 550 (Fla. 5th DCA 1995).

The trial court's open bias and prejudice has resulted in a constitutionally infirm death sentence. Her prejudgment of the case resulted in a denial of fundamental due process. The rulings denying additional funds for mitigation investigation resulted in a denial of Robinson's constitutional right to equal protection under the law guaranteed by the United States and Florida Constitutions. In spite of the trial court's assertions, a millionaire facing the death penalty would have spent more than $35,000.00.

> THE COURT: I want this done, and I think this guy has had absolutely an incredible defense here. A millionaire, **J. Paul Getty couldn't afford what this man has already gotten**.
> MR. BENDER(defense counsel): That may be carrying a little too far.
>
> THE COURT: **I don't think so. I'm not even far off that.**

(RA 12, Vol. 1) Appellant and this Court recognize this statement by the trial court as ludicrous. J. Paul Getty would have spent as much money as necessary, if he were facing the death penalty. That is why there are no rich people on death row. If this Court does not reverse Robinson's unfairly imposed death sentence, appellant is confident that a federal court will eventually grant relief. This Court

should save time and money and vacate Michael Robinson's death sentence and remand for the imposition of a life sentence.

POINT IV

THE DEATH SENTENCE IS NOT WARRANTED AND IS DISPROPORTIONATE IN THIS CASE.

Article I, Section 17 of the Florida Constitution mandates proportionality review. See, e.g., Tillman v. State, 591 So.2d 167 (Fla. 1991). "[P]roportionality review requires a discrete analysis of the facts." Terry v. State, 668 So.2d 954, 965 (Fla. 1996). Assuming arguendo that the state proved the three aggravating factors found by the trial court, (although they probably proved at most only one, maybe two aggravating factors) in light of the plethora of mitigating factors, a valid weighing of the evidence reveals that this case simply does not qualify as one warranting the imposition of the ultimate sanction.

The trial court accepted numerous factors in mitigation including:

> (1) The crime was committed while Michael Robinson was under the influence of extreme mental or emotional disturbance [the court gave this mitigator "some weight"]. (RA 343-46, Vol. 4)
>
> (2) Robinson's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired. [given great weight] (RA 346, Vol. 4);
>
> (3) Robinson acted under extreme duress, although it was internal rather than external [given some weight as a nonstatutory mitigator] (RA 346-47, Vol. 4);

(4) Robinson suffers from brain damage due to birth trauma, illness, and accidents with testing data consistent with frontal lobe disfunction [given a little weight as there is insufficient evidence it caused Robinson's conduct.] (RA 347-48, Vol. 4);

(5) Robinson was under the influence of cocaine at the time of the homicide [discounted by the trial court as being duplicative of the first four mitigators, particularly number 2] (RA 348, Vol. 4);

(6) Robinson has shown remorse [given a little weight] (RA 349-50, Vol. 4);

(7) Robinson is religious and believes in God [little weight] (RA 350, Vol. 4)

(8) Robinson's father was an alcoholic [some weight] (RA 350, Vol. 4);

(9) Robinson's father was physically abusive [slight weight] (RA 350-351, Vol.4);

(10) Robinson suffers from personality disorders, e.g. schizophrenia, antisocial behavior, and sociopathy [given between "some" and "great or considerable" weight due to poor prognosis] (RA 351, Vol. 4);

(11) Robinson was categorized as emotionally disturbed as a child, e.g., attention deficit disorder and hyperactivity [given considerable weight along with his current mental and emotional mitigators] (RA 351-52, Vol. 4);

(12) Robinson obtained his GED while in a Missouri juvenile facility [given minuscule weight] (RA 353, Vol. 4);

(13) Robinson is a model inmate [very little weight] (RA 354, Vol. 4)

(14) Robinson has been previously beaten and raped in prison [given some weight as it was part of the "duress" considered in #3] (RA 354, Vol. 4);

(15) Robinson confessed and assisted police [given a little weight] (RA 355, Vol. 4);

(16) Robinson successfully completed a sentence and parole in Missouri [minuscule weight] (RA 358, Vol. 4);

(17) Robinson has the ability to adjust and display good behavior while serving life in prison [very little weight] (RA 358, Vol. 4);

(18) Robinson has people who love and care about him [given extremely little weight] (RA 358, Vol. 4).

The trial court summarized the mitigating evidence:

> When the dust settles, it is clear that Michael Robinson is a sociopath. The doctors have put the best spin they can on the test results. There is no doubt that the Defendant has had problems since very early in his life. His home life was not perfect, but it was not so far from the norm of that day that it explains or justifies the Defendant's aberrant behavior for the past 20 plus years. Perhaps his failure to bond from the very beginning led to his sociopathic personality disorder. If so, none of his accidents or injuries are really relevant. In fact Dr. Upson said he could have mild brain damage or he could be normal. If there were brain damage, he does not know how or if it would have affected his behavior. The doctors also cannot say that any or a combination of his injuries could be responsible for his behavior. Everyone

> can agree that his extensive drug abuse/addiction is a primary problem and has led to his misconduct. Because his father was an alcoholic, some credence was given to the possibility of his addiction being hereditary. His drug addiction, together with his sociopathic personality disorder are the two primary mitigators and there were weighted heavily. Many of the other mitigators enumerated by the defense were merely offshoots of these two.

(RA 358-59, Vol. 4) Despite the extensive mitigation **accepted by the trial court**, the judge concluded that the three "garden variety" aggravators outweighed the substantial mitigation.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988). Its application is reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). The doctrine of proportionality is to prevent the imposition of "unusual" punishments, contrary to Article I, Section 17 of the Florida Constitution, among other reasons. While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is disproportionate, the nature and quality of the factors must be weighed as compared with other death appeals. Kramer v. State, 619 So.2d 274, 277 (Fla. 1993)citing Tillman v. State, 591 So.2d 167, 168-69 (Fla. 1991).

Defendants who commit similar crimes should receive similar punishment. Uniformity thus drives this unusual form of appellate scrutiny. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Accordingly, this case falls into the "alcohol haze" genre. The defendants found in that category have been alcoholics, drug addicts, or other substance abusers for most of their lives. Substance abuse defines them, and more significantly, it sets the stage for the murders the defendants commit. Typically, they (and occasionally a co-defendant) have spent the day drinking beer, snorting or smoking cocaine, or sniffing glue. Sometime during the day, a fight may "spontaneously" erupt during which the victim may be tied up and beaten to death. Though the murder may have been especially heinous, atrocious, or cruel (if the victim was awake or conscious during the attack which Robinson's was not), it is not cold, calculated, and premeditated (usually as a result of the severe substance abuse). Subsequent thefts or "robberies" typically occur as an afterthought. The defendants also may have a criminal history of committing violent crimes (although Michael Robinson does not). On the other side of the scale, and of more significance, the defendants usually have extensive histories of alcoholism, were under the influence at the time of the murder, have lost emotional control and have substantial impairment of the capacity to control their behavior. Other mitigation may exist as in Robinson's case. The attacks are

the combination of severe drug abuse and bingeing coupled with extremely poor impulse control and bad judgment.

Despite the presence of one or more aggravators, some being especially weighty, this Court has consistently rejected death sentences for defendants in these situations. See, e.g. Kramer v. State, 619 So. 2d 274 (Fla. 1993); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Knowles v. State, 632 So.2d 62 (Fla. 1993); and White v. State, 616 So.2d 21 (Fla. 1991).

In Kramer the trial court found two aggravators. In mitigation, the court found many factors including that: Kramer was under the influence of mental or emotional stress at the time of the crime; his capacity to conform his conduct to the requirements of the law was severely impaired at the time of the crime; he had previously been a model prisoner and a good worker; and he suffered from alcoholism and some prior drug abuse. 619 So.2d at 276. Kramer beat his victim to death with a blunt instrument while both were drunk. In reviewing whether death was proportional in the case, this Court found that the prior felony conviction clearly existed and it assumed HAC existed. However, the mitigating factors of alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning were dispositive. The death penalty was disproportionate. 619 So.2d at 277-278.

Appellant points out that Jane Silvia's murder was not "heinous, atrocious, or cruel", frequently a telling barometer of which first-degree murders generally result in a death sentence. Additionally, the finding of the "heightened premeditation" aggravator should be viewed in conjunction with Robinson's bingeing on crack cocaine in the months prior to the murder. Such persistent, extensive drug use mitigates against a finding of this factor and should affect the weight given the circumstance, if found at all. Appellant also questions the trial court's finding of both "pecuniary gain" **and** "elimination of a witness." These two factors seem to be inextricably intertwined in the peculiar facts of Robinson's case. Appellant also points out his lack of a prior violent felony conviction, an aggravator that applies to almost every capital defendant. Michael Robinson should spend the rest of his life in prison. Because of the substantial, valid mitigation, Michael Robinson does not deserve the ultimate sanction.

In this case, it must be noted that Michael Robinson initially pled guilty, waived a penalty phase jury, and asked to be sentenced to death. Actually, Robinson decided shortly after his arrest that he deserved to die for the murder of his girlfriend. (RB 237-38, Vol. 4) He told Detective Griffin as much in his confession. Id. As such, the trial court as well as this Court should look upon Robinson's confession with great skepticism. Robinson's self-serving statement

to Detective Griffin was an attempt to maximize aggravating factors and minimize any potential mitigating evidence.[9] This Court **must** consider Robinson's motivation when making his confession. If the situation had been reversed, i.e. Robinson had been seeking to avoid a death sentence, appellant guarantees that the state would be discounting a confession that denigrated aggravating factors and maximized mitigating evidence, e.g., "I was out of my mind on drugs and alcohol."

Additionally, the trial court failed to find unrefuted, valid mitigation and erred in her consideration of the mitigating evidence that she did find. Specifically, the trial court did not seem to understand the tremendous impact that brain damage can have on an individual. She appeared to require the defense to prove exactly how Robinson's brain damage caused the murder. "The doctors cannot say that any one of these circumstances [head traumas] affected his mental or emotional status sufficiently to cause his criminal behavior." (RA 345, Vol. 4) The trial court misses the point. Her treatment of this significant mitigation is

---

[9] In one breath, the trial court remarks about Robinson's extremely high intelligence ["rational, confident, well spoken, well groomed, intelligent, and focused"]; (RA 336); ["above-average intelligence"]; (RA 343); ["one of the most polite and intelligent defendants to come before this court"]; (RA 349, Vol. 4), yet in the next breath, concludes that, at the time of his initial confession he probably could not fathom the concept of aggravating and mitigating factors. (RA 340, Vol. 4).

analogous to the trial court's failure to understand the effect of an abused childhood in Campbell v. State, 571 So.2d 415 (Fla. 1990). Additionally, the trial court inappropriately rejected valid mitigation even improperly considering it as aggravation. See, e.g., Robinson's behavior during all court appearances has been acceptable, which is indicative of his ability to conform as well as manipulate. (RA 349, Vol. 4)

The mitigation in this case is substantial. It reflects an irrational crime by an emotionally distressed drug addict who was under the influence at the time of the murder. There was unrefuted proof that both statutory mental mitigators were present in Robinson's case. Numerous other non-statutory mitigating factors were also present. Death is disproportionate under the circumstances present here. See, Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990) (evidence that the defendant was an abused child and became chronic alcoholic who lacked substantial control over his behavior, and had been drinking heavily on the day of the murder; death sentence disproportionate); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990) (childhood abuse and neglect, marginal intellectual functioning, and evidence of extensive use of cocaine and marijuana counterbalanced the two factors found in aggravation; death penalty vacated); Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1988) (death not proportional despite finding of five aggravators; mitigation

showed extreme mental or emotional disturbance, inability to appreciate criminality of conduct or conform conduct to law, and low emotional age). Michael Robinson's case is no worse. He deserves to die in prison, but not in Florida's electric chair.

POINT V

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

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

> The Defendant knew the victim had $100 in her shoes. His mother had sent it to her so she could retrieve her stolen property. (The Defendant's mother testified that she sent the money to Jane because she had previously sent money to the Defendant to buy back property, and he had spent it on drugs.) Jane had already spent $20 of the money the Defendant's mother had sent her. She used that to pay a debt of the Defendant. Prior to the killing, the Defendant had no money. He'd stolen Jane's property to get drugs. His own mother had sent Jane the money to pay to get Jane's property back. The Defendant admits he took the money from her shoes after he killed her and that he took it to buy drugs. He told Detective Griffin that when he confessed on August 16, 1994; he told the Court in 1995; and he told Dr. Upson in May 1997 that he bought drugs immediately after killing Jane. His words to the Det. Griffin were, "... so that was one of the reasons that I, uh, kill her was to retrieve that money from her." He reiterated this later in his statement to the Court. However, at the second penalty phase, he said he told the police and the Court this was a reason for killing Jane was because he knew that would be bad and would help insure he got the death penalty. This Court finds it doubtful that he knew when he first talked to law enforcement that he had any idea what aggravators in a death case are. Additionally, he did take the money and he still says he bought drugs

> with it. It is consistent with his pattern of conduct; he did whatever he needed to do get drugs. Although not the primary reason for killing Jane Silvia, it undoubtedly was one reason. Consequently, this aggravator is proved beyond a reasonable doubt.

(RA 339-40, Vol. 4)

It is respectfully submitted that, as a matter of law, the evidence is insufficient to support application of this statutory aggravating factor. The only evidence that Robinson committed the murder for pecuniary gain comes from Robinson's own self-serving confession. This Court must remember that, shortly after his arrest, Michael Robinson decided that he wanted the death penalty. He confessed to Detective Griffin and stated that he deserved execution. (RB 238, Vol., 4)

This Court has previously recognized that a defendant's confession does not necessarily carry the State's burden of proof. See, e.g., Amazon v. State, 487 So.2d 8 (Fla. 1986) (defendant allegedly confessed he killed to avoid arrest but the statement was disputed and this Court disapproved this aggravating circumstance). See also Cook v. State, 542 So.2d 964 (Fla. 1989) and Garron v. State, 528 So.2d 353 (Fla. 1988). Indeed, in this particular case, this Court should look with great skepticism on Robinson's statements made when he was insisting on a death sentence. Robinson's entire motivation at that time was to obtain a death sentence.

On remand for the second penalty phase, Robinson confirmed the fact that he did embellish the facts so that this particular aggravating factor would apply and he would receive the death penalty. Once Robinson decided to let the system work as it should, he did not deny killing Jane Silvia in order to avoid returning to prison. Nor did he deny thinking about it and planning the murder ahead of time. He did deny killing Silvia for the money in her shoes.

> However, the truth is what I would like to be shown and not the twisted manner of truth, which I myself gave your court the evidence that it has against me..... [RA 232, Vol. 2].... I didn't want to give any chance of any other outcome happening except for the death penalty. Just like when I told the police when they asked me about the money, I said, yea. If you would listen to this tape really closely, they asked me twice about the money, and I answered two different things close. They were similar, but I thought in my own mind, I know that this is going to be a bad thing that I'm saying I did was a reason that I took the money.
>
> That wasn't the reason. There was only one reason at the time that Jane died and that was because I didn't want to go to prison. That was the only reason that Jane died. ...That was something that I said in a suicidal manner to make sure that I was going to get the death penalty. The only reason I'm saying anything is, like I said, I want the truth to be told today. I believe that today that God is here.

(RA 235, Vol. 2)

Listening to Robinson's statement to Det. Griffin confirms the fact that this murder was not committed for pecuniary gain. After concluding his initial statement to Detective Griffin, Robinson went back on tape one hour later to specifically claim that he stole money following the murder. (RB 238-39, Vol. 4)

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

* * *

Q: Ok. Ok, uh, anything else?

A: Uh, no. Like I said, just... you know, the reason I killed her was to basically, stay out jail and...and to retrieve the money.

(RB 239-40, Vol. 4) (Emphasis added.) Robinson is right. The statement does not even sound credible. Robinson is telling the police what they want to hear and what he thinks will insure a death sentence.

The trial court's disbelief of Robinson's statement at the second penalty phase is disingenuous at best. The trial court found it doubtful that Robinson "had any idea what aggravators in a death case are" when he first talked to law enforcement. (RA 340, Vol. 4) When it later suits the trial court's end, she notes Robinson's extremely high intelligence ["rational, confident, well spoken, well groomed, intelligent, and focused"] (RA 336); ["above-average intelligence"] (RA 343); ["one of the most polite and intelligent defendants to come before this court"] (RA 349, Vol. 4). Dr. Upson confirmed that Robinson was smart enough to tweak his confession to maximize his chance to receive the death penalty. (RA 80, vol. 1) That is precisely what Robinson did.

The State failed to prove this aggravating circumstance beyond a reasonable doubt. Robinson's confession shows that the taking of the money clearly occurred

after the murder, as an afterthought. This circumstance is therefore not applicable. Clark v. State, 609 So.2d 513 (Fla. 1992); Hill v. State, 549 So.2d 179 (Fla. 1989).

POINT VI

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

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

> The Defendant freely admits he killed Jane Silvia to prevent her from prosecuting the theft of her TV's, microwave, and VCR. She had already reported the theft, and it was the Defendant's understanding that she had 7 days to decide if she wanted to act on that complaint. If she did not call the law enforcement agency back, nothing would happen. To his credit, he and Jane attempted to get the items back, but when the Defendant learned it would be impossible, he decided to kill her. Because he was on a control release from the Department of Corrections, he knew that a law violation would cause him to be returned to prison to complete his sentence. He wanted to avoid this at any cost. This is proved beyond any doubt at all based on his admission from the time he first confessed to Det. Griffin through the date of the second penalty phase. Additionally, he testified that he and Jane had no argument before this occurred and he loved her. This and pecuniary gain are the **only** reasons for killing Jane; avoiding arrest and prison was very definitely the dominant reason. There is absolutely no pretense of moral or legal justification for killing her. The aggravator is proved beyond a reasonable doubt. [Citations omitted]

(RA 338-39, Vol. 4) It is respectfully submitted that, as a matter of law, the

evidence is insufficient to support application of this statutory aggravating factor.

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

The evidence fails to support that the only reasonable conclusion that Robinson killed Silvia was **primarily** to eliminate her as a witness. The only evidence that Robinson killed Silvia to eliminate her as a witness comes from Robinson's own self-serving confession. This Court must remember that, shortly after his arrest, Michael Robinson decided that he wanted the death penalty imposed. He confessed to Detective Griffin and stated that he deserved execution. (R238) This Court has previously recognized that a defendant's confession does not necessarily carry the State's burden of proof. See, e.g., Amazon v. State, 487

So.2d 8 (Fla. 1986) (defendant allegedly confessed he killed to avoid arrest but the statement was disputed and this Court disapproved this aggravating circumstance). See also Cook v. State, 542 So.2d 964 (Fla. 1989) and Garron v. State, 528 So.2d 353 (Fla. 1988). The State failed to prove beyond a reasonable doubt that Robinson made a **prior** determination to murder Silvia **solely or primarily to eliminate her as a witness.**

POINT VII

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

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

> The Defendant planned the murder of Jane Silvia very deliberately once learning he could not retrieve her property. He watched her sleeping; he got his hammer from the truck and put it in the bedroom. He sat in front of the couch watching her. He laid down next to her waiting for her to fall asleep. He went to the bedroom to get the hammer. He came back and lay on the floor next to the couch and watched her some more. Then, when she seemed to be asleep, he began hitting her in the head with the hammer. He said that each time he hit her, the hammer went into her brain, but she was not dying fast enough and she was making some noises that the Defendant was afraid neighbors would hear. So he turned the hammer around and used the claw side to hit her. She still was breathing, so he stuck a serrated butcher knife into the soft part of her throat and down into her chest to try to stop her heart and breathing. After she was dead, he wrapped her in the shower curtain secured with a coat hanger, coax cable, and a belt and buried her. Later his first statement to the police was that some drug dealers had killed her, but ultimately when the

> police were zeroing in on him on August 16, 1994, he gave his final statement admitting to Detective Griffin that he killed Jane Silvia. He carried out this murder in a cold, calm manner with plenty of time to reflect on the consequences. There was no argument, no frenzy, no rage. He even said he loved Jane. He carefully planned how he would kill Jane and he waited for her to fall asleep so there'd be no physical fight. The manner in which he killed Jane was deliberate and ruthless. There was absolutely no pretense of moral or legal justification. Even the Defendant admits this. Even to this day, when the Defendant describes the murder, he does so in a matter-of-fact manner with no emotion. He describes the sound of the hammer hitting her head -- like a watermelon, blood gurgling from her mouth, all with no emotion. This aggravator is proved beyond a reasonable doubt.

(RA 341-42, Vol. 4)

Even if this Court accepts Robinson's version of the murder, the requisite heightened premeditation is absent. After returning to the apartment at 10:30 p.m., the couple ate and Jane fell asleep on the couch. (RB 231) Robinson retrieved the hammer from his truck and re-entered the apartment. (RB 231-32) Robinson "laid in front the couch again to make sure she wasn't stirring. I laid there for a little while really nervous and shaking, cause I'd never done anything like this before. I was kind of scared about what I was fixing to do. And, uh, I got up,...I stood there and hit her in the head with a hammer..."

It is just as reasonable a construction of the evidence that Robinson was vacillating in his decision to kill Silvia. This is not the classic cold, calculated, and premeditated type of murder without any pretense of moral or legal justification. Robinson reached the actual decision to kill seconds before he committed the act. There was no poisoning of food over a period of months to dispatch a spouse for insurance proceeds. See Buenoano v. State, 527 So.2d 194 (Fla. 1988). Nor is this an elaborate plan that Robinson concocted prior to or during the killing, thus making the homicide "execution style." See, e.g., Rutherford v. State, 545 So.2d 853 (Fla. 1989) (extensive plan included murder of robbery victim); Hill v. State, 422 So.2d 816 (Fla. 1982) (defendant made decision to rape and murder the victim before he picked her up).

Additionally, Robinson's mental problems would not permit him to form the requisite "heightened premeditation." Dr. Lipman explained that Robinson:

> He told me that he loved the victim very much. He told me that she was everything to him, that she was, in a sense, his savior. ...he was humiliated by himself, by the things that he had done to offend her, and she supported him still. With this feeling in mind, **the killing occurred in a state that he described as very compulsive, that he was driven, that he felt that he had to do this, that he felt that he had no choice.**
>
> And he regretted it. **He didn't want**

> **it to happen, but he described the most profound compulsion in a sense, one would call this, I suppose, premeditation except in his particular way of thinking it was a very compulsive premeditation.** ...It was very clear that at the time he didn't see any alternatives.

(RA 155-56, Vol. 2)(Emphasis added.) With his mental state as it was, Robinson cannot qualify with this particular aggravating factor.

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

> The state relies heavily on the fact that Thompson awoke at 8 a.m. and killed the victim at 8:30 a.m., arguing that Thompson had thirty minutes to think about what he was doing before

> he killed Place. But there is no evidence in the record to show that Thompson contemplated the killing for those thirty minutes. To the contrary, the evidence indicates that Thompson's mental state was highly emotional rather than contemplative or reflective. **It is an equally reasonable hypothesis** that Thompson hit his breaking point close to 8:30 a.m., reached for his gun and knife, and killed Place instantly in a deranged fit of rage. "Rage is inconsistent with the premeditated intent to kill someone," unless there is other evidence to prove heightened premeditation beyond a reasonable doubt. Mitchell v. State, 527 So.2d 179, 182 (Fla.), **cert. denied**, 109 S.Ct. 404 (1988). Thus, the evidence does not support beyond a reasonable doubt a finding that this aggravating circumstance exists.

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

Michael Robinson is a brain-damaged crack addict who was in a highly emotional state when he killed Jane Silvia. He loved Jane and she loved him. However, his drug addiction and fear of prison drove him to murder. This is not

the type of case reserved for this particular aggravating circumstance. There was no "heightened premeditation" here.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Court to grant the following relief:

As to Point I, vacate Robinson's death sentence and remand with instructions to allow Robinson to withdraw his guilty plea;

As to Point II, vacate Robinson's death sentence and remand for the imposition of a life sentence without parole or, in the alternative, for a new penalty phase where the results of a brain scan are considered;

As to Point III, vacate Robinson's death sentence and remand for the imposition of a life sentence without parole or, in the alternative, remand for a new penalty phase before a different judge;

As to Points IV, V, VI, and VII, vacate Robinson's death sentence and remand for the imposition of a life sentence without parole.

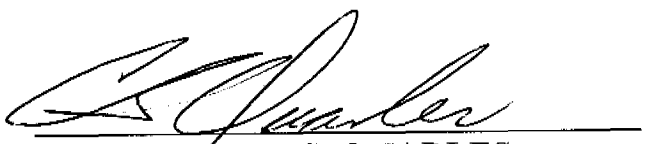
Respectfully submitted,

PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

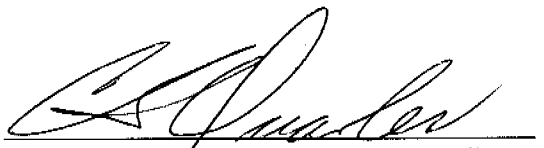
I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Mr. Michael L. Robinson, #713735, Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 13th day of August, 1998.



CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman.



CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER