IN THE SUPREME COURT OF FLORIDA

DONTE HALL,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO.: SC09-2326
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

On March 15, 2007, a Lake County grand jury returned a seven-count indictment charging Donte Jermaine Hall, the appellant, with conspiracy to commit armed robbery; armed burglary; robbery with a firearm; two counts of attempted felony murder; and two counts of first-degree murder with a firearm. (I 1-3)

Prior to trial, Appellant filed numerous motions relating to the unconstitutionality of Florida's death penalty sentencing scheme. ***See, e.g.,*** Motion for Statement of Particulars as to Aggravating Circumstances and to Dismiss the Indictment for Lack of Notice as to Aggravating Circumstances. (I 81-88); Motion to Dismiss Indictment or to Declare that Death is not a Possible Penalty (I 157-59); and Motion to Dismiss Indictment (I 162-78). Most of these

motions were, in large part, denied. See, e.g., (IV 734-41)

This case proceeded to a jury trial before the Honorable T. Michael Johnson in April 2009. Following deliberations, the jury returned verdicts of guilty as charged on all seven counts. (III 409-17)

On April 21, 2009, this cause proceeded to a penalty phase. (XVI 1-200; XVII 201-32) Following deliberations, the jury recommended life imprisonment for the murder of Kison Evans. The jury unanimously found all three aggravating factors on which they were instructed for the murder of Kison Evans. For Evans' murder, the jury was not instructed as to the aggravating factor of especially heinous, atrocious or cruel.[1](III 447-48) The trial court subsequently followed the jury's recommendation and sentenced Appellant to life imprisonment for the murder of Kison Evans.

In contrast, by a vote of eight to four, the jury recommended the death penalty for the murder of Anthony Blunt. The jury unanimously found three aggravating factors (pecuniary gain; prior violent felony conviction; and knowingly creating a great risk of death to many persons). However, the jury was not unanimous in their finding that the murder of Anthony Blunt was especially heinous, atrocious or cruel. The trial court instructed the jury on this particular

[1] All parties below, as well as the trial court, agreed that the factor was

aggravator over Appellant's objection. Eleven of the jurors agreed on the fourth aggravating circumstance (HAC). (III 445-46; VI 918)

Following a ***Spencer***[2] hearing, the trial court sentenced Donte Hall to death. In sentencing Appellant to death for the murder of Anthony Blunt, the trial court found the following aggravating factors:

1) Appellant was previous convicted of a felony involving the use or threat of violence (some weight);

2) Appellant knowingly created a great risk of death to many persons (great weight);

3) The capital felony was committed for pecuniary gain (great weight); and

4) The murder was especially heinous, atrocious or cruel (great weight).

(III 524-33)

In considering the statutory mitigating factors, the trial court concluded that Appellant's capacity to conform his conduct to the requirements of the law was substantially impaired. The trial court gave this mitigating factor "some weight." (III 533-35) The trial court rejected Appellant's age (22) as a mitigating circumstance. As for non-statutory mitigating factors, the trial court found the following to be applicable:

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inapplicable to the murder of Kison Evans.

1) Appellant behaved appropriately during the course of the court proceedings (minimal weight);

2) Appellant's family background demonstrated generational alcohol and drug abuse (some weight);

3) There was generational, criminal behavior, in Appellant's family background (some weight);

4) Appellant had few positive role models during his youth (some weight);

5) Appellant grew up in a dangerous neighborhood that reinforced drug use (some weight);

6) Appellant was abused as a child (minimal weight);

7) Appellant lived in many different living arrangements as a child (minimal weight);

8) Appellant suffered from Attention Deficit Disorder and is considered borderline mentally retarded (some weight); and

9) Appellant has an extensive history of drug and alcohol abuse (minimal weight).

(III 536-43) The trial court concluded that the aggravating factors outweighed the mitigating factors and sentenced Appellant to death. (III 544-45)

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[2] ***Spencer v. State***, 615 So.2d 688 (Fla. 1993)

On June 2, 2009, Appellant filed a motion for new trial. (III 480-82) On June 10, 2009, the trial court denied the motion for new trial. (III 285-86; V 927-30) Appellant filed a timely notice of appeal on December 11, 2009. (I 606). This brief follows.

STATEMENT OF THE FACTS

State's Guilt Phase Case-In-Chief

During June of 2006, Angel Glenn was a nineteen-year-old, single mother living in Orlando. She had previously met Dante Hall, Appellant's twin brother, before she began dating Donte Hall, the appellant, in June 2006. People knew both Appellant, Donte, and Dante by the identical nickname "Twin." Angel was able to distinguish the two twins. Appellant's lower front teeth were gold, whereas Donte's were not. Additionally, Appellant sported a tattoo on his neck that said, "Money ain't a thing." (XI 1150-52) Furthermore, Appellant's voice sounded a little deeper than his brother's.

Angel was unemployed but picked up spare cash by stripping at private parties on the weekends. Angel smoked marijuana daily, took ecstacy on the weekends, and drank alcohol every other day. Angel and Appellant became very close over the next several months. Angel loved Appellant and hoped to marry him one day. (XI 1154-57)

Near the beginning of September 2006, Angel met a man named Jay[3] at a club in Orlando. Angel told Jay that she stripped at private parties on the weekends. Jay expressed interest in hiring Angel for a party that weekend in

[3] Jay was a nickname used by Willie Shelton. (VIII 595-600)

Eustis, Florida, a town Angel had never visited. She and Jay exchanged phone numbers. (XI 1158-59)

Angel had a Nextel Boost which had a cell phone capacity as well as walkie-talkie capability. Angel usually had the walkie-talkie function set on "speaker", so that other people could hear both sides of the conversation if someone "chirped." (XI 1159-60) As a result, Appellant heard some of the conversations between Angel and Jay about the party. Appellant heard Jay tell Angel that the girls would all make a lot of money.

When Appellant heard about the proposed party, he suggested the possibility of robbing the men. Angel thought it was a good idea and anticipated sharing the loot. With Appellant as her passenger, Angel drove her car to a BP gas station where they got gas. They had been delayed somewhat by a flat tire. (XI 1164-70) Around 10:00 p.m. that night, Angel and Appellant picked up Angel's friend, Nikita, another stripper who was going to the party. The girls, pursuant to Appellant's instructions, dropped him off at an apartment complex near the Florida Citrus Bowl. (XI 1171-73) As Angel dropped off Appellant, she spotted Dante's rental car that Appellant had recently been driving. The trunk of the car was open. Appellant and some other people gathered around the car. Angel knew that, with her cooperation, the group was planning the robbery that night. (XI 1173-78)

Angel and Nikita picked up Brittany, another friend and stripper. The trio stopped at McDonald's for a bite to eat and then headed towards Lake County. Angel did not tell the other girls about the planned robbery. (XI 1178-80)

The girls were late for the party. Jay kept "chirping" Angel's phone asking where they were. Meanwhile, Appellant was also chirping Angel to ask her location. Angel eventually noticed headlights of a car following her and concluded that it was Appellant and his confederates. Angel had her Nextel Boost set on private during the drive to Lake County, so the other girls could not hear the other end of her conversations. (XI 1179-82)

Jay eventually directed Angel to a gas station in Lake County. Angel stopped her car in the parking lot, got out, and talked to Jay. Jay instructed her to follow his car down a side road. Jay stopped at a house to pick up something. Incorrectly thinking they were at their destination, Angel got out of her car. When she did, she spotted Dante's rental car which appeared to be following them. After a brief stop at that house, the girls followed Jay to a different house where the party was about to begin. (XI 1179-87) As they were arriving at the house, Angel noticed Dante's rental car again as it drove past the house. (XI 1189-90)

Once inside the house, the three girls went to a back room, got into costume, took ecstasy, smoked pot, and drank alcohol. The start of the party was delayed

again due to the lack of music. During the delay, Angel was periodically on the phone with Appellant, giving him details about the number of men, the absence of firearms, and the reason for the delay. (XI 1187-94)

The music finally started and the girls began dancing and removing their clothing. They had only been dancing five or ten minutes, when four masked men burst into the house brandishing guns. Although they wore masks, Angel identified the gunmen as Appellant, his twin brother Dante, Pig, and Shoo-Shoo. Appellant ordered everyone to the floor and demanded that they hand over their valuables. According to Angel, Appellant stated, "Fucking niggers, we're going to make this choppa dance, give us...everything ya got...!". (XI 1194-98) Both Appellant and Shoo-Shoo had large guns similar to an AK-47. (XI 1195-97) When the men did not move quickly enough, the masked assailants fired more shots. That's when the lights went out. The victims began taking off all of their jewelry and handing it over. (XI 1198)

One of the men at the party said that there was a box in a back room of the house. Dante tried to enter the room, but found the door locked. Dante returned to the room, angry that he could not get to the box. (XI 1198-1200) More shots were fired and all hell broke loose. The girls were screaming and the men were yelling. Shortly after the robbery began, it was over. The assailants fled the house. The

girls hurriedly got dressed and stated to flee. Some of the surviving party attendees fled the house. (XII 1214-17) The police and medical help arrived shortly.

Several men who were at the party that night described the robbery and shooting. Willie Shelton, also known as Jay[4], described how four masked men burst into the house, shortly after the girls started dancing. Willie and his friends complied with the assailants' orders. Apparently without provocation, one of the men began to shoot Joshua Daniel (JD). At that point, Kison Evans asked the men to stop shooting. Kison told them that there was a box of money in the back room. Shelton knew that this was a lie. Shelton believed that Kison was simply trying to buy some time and save their lives. When the search for the box of money proved futile, the assailants became angry and threatened to kill them all. One of the men then shot Kison in the head. (VIII 598-617)

Nikita, one of the strippers, and other men attending the party described the scene as pure bedlam. The party attendees as well as the three strippers were confined to a small Florida room when the shootings occurred. Other than the four assailants, there were approximately ten people in the room. Two of the men were killed and two were seriously injured. At least sixteen shots were fired that night at the house. Once the assailants obtained the victims' jewelry and cash, they quickly

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[4] Shelton corroborated Angel Glenn's testimony about meeting her in a

fled the scene. Many of the survivors who were not seriously wounded also fled. (VIII 572-94; IX 614-19, 660-70, 677-89; X 849-57; XII 1336-41; XIII 1435-50, 1462-81; XIV 1649-1649-74, 1678-91)

In the days following the shootings, Angel talked to Appellant about what happened. Angel wanted to know how the robbery turned into murder. Appellant explained that, sometimes he turned into a "whole other person."(XII 1265-68) Appellant made Angel promise that she would never tell on him. The police had tried to call Angel and, on Appellant's advice, she changed her phone number. (XII 1268-69)

The police ultimately arrested Angel, but she was eventually released on bond. In violation of her probation conditions, Angel communicated with Appellant by telephone, while he was incarcerated in the Orange County jail. (XII 1270-75; State's Exhibit 55) During one of those phone calls, Appellant asked Angel what had happened to her in court. She explained that she had been released on bond with an ankle monitor. Angel chastised appellant for taking his cell phone with him that night. Appellant replied that the Orange County Police Department had his cell phone, not the authorities in Lake County. Near the end of the conversation, Appellant stated that he had no cell phone, with which, Angel

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nightclub and setting up the party for the following night. (VIII 595-600)

agreed. (XII 1309-12) At trial, Angel explained that she agreed with Appellant, because she knew the conversation was being recorded.

Angel originally lied to the police about her involvement[5], and also to the judge about violating her conditions of probation. She eventually reached an agreement with the state to tell the truth. In exchange, the state agreed to drop all of her charges except conspiracy to commit armed robbery, for which she faced up to fifteen years. Prior to that deal, Angel faced up to life in prison. The state also agreed to drop her perjury charge. (XII 1280-83)

At trial Angel identified Appellant as the man who fired first, did most of the talking, and talked about making the "choppa dance." (XII 1284-86) She described the other men's participation as less substantial.

Despite a thorough crime scene investigation, police found no physical evidence at the scene that connected Appellant nor any of his friends to the crime. There were no fingerprints that could be identified as inculpatory. Ballistic tests were also futile.(IX 748-51; X 960-73)

While Appellant was incarcerated prior to trial, he had a conversation with Timothy Evans, Kison Evan's younger brother who was also incarcerated. Appellant approached Evans in jail and asked him to let the victim's mother know

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[5] Police originally focused on Angel after her friend and fellow stripper, Nikita

that, although Appellant was present at the scene, it was his brother Dante, not Appellant, who shot Kison. (XIII 1486-1507)

Norman Mavers, another jailhouse snitch, was housed in the Orange County Jail with Appellant in the summer of 2007. When Appellant learned that Mavers had recently been in circuit court in Lake County, Appellant asked about the jail conditions and court proceedings. Appellant explained that he had a case pending in Lake County involving two first-degree murders and two attempted murders. Appellant explained in some detail about the shootings that night. In doing so, Appellant made admissions that he, as well as his brother, a friend named Pig, and his stripper girlfriend robbed and shot some men in Eustis. (XIII 1508-48)

In addition to the testimony of Angel Glenn, the state's star witness, cellular phone records tended to corroborate Angel's testimony. (VIII 552-65; IX 775-78; X 845, 862-66, 943-49, 952-59; XI 1081-83, 1092-1134; XII 1302-6, 1363-92; XIII 1431-34; State's Exhibit 55) The cellular phones that were used that evening were not the usual type with annual accounts. Rather, they were prepaid cell phones that could be registered under any name and address, authentic or not. April Leaster testified that she registered a cell phone under a fake name and address and gave it to Appellant. This was the phone that she called him on while they were

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Jackson, went to the police at the urging of her mother. (X 875-82, 919-28)

dating in the spring of 2006. She admitted that she had no idea who was using the phone after that. (VIII 566-71; X 943-49, 953-55)

Additionally, security video from several locations during the travels of the group that night, indicated that a person, whom Angel identified as the appellant, was in her company. (XII 1275-79; 1288-92; State's Exhibits 41 and 42) Additionally, jewelry identified as belonging to the victims was pawned by Angel Glenn and Kim Jones[6] at the request of Appellant and his twin brother, Dante. (IX 686-89, 694-95; X 862-66; XI 1039-56; XII 1245-47)

Appellant's Guilt Phase Case-In-Chief

Appellant's mother, Louise Laster, had a distinct recollection that Appellant was at her apartment at the time of the shootings in Eustis. She noticed that he was there from 4:00 in the afternoon and stayed in the building. He did visit one of the neighbors across the hall from his mother's apartment. Appellant's mother had to retrieve him from that apartment when he received a phone call at approximately 8:30 p.m. After the short phone call, Appellant returned to the apartment next door, where a woman who was interested in him resided.[7] (XIV 1726-30, 1734-

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[6] Kim Jones was Dante's "baby mama". (XI 1025-28)

[7] The woman was the sister of Appellant's friend who also lived there. Appellant's mother did not approve, because the woman was in her thirties. (XIV 1734-35)

37) He returned to his mother's apartment at approximately 11:00 p.m. His mother commented that he smelled like a brewery, because he had been drinking heavily. Around midnight, she observed him fall asleep on the couch in the living room of her apartment. She then went to her own bedroom and went to sleep. The next morning, she got up, and saw Appellant still sleeping on the couch. He was still wearing the same clothes he had on the night before. (XIV 1737-39) If he had left the apartment that night, his mother, being a light sleeper, would have heard him. (XIV 1738-39)

When news of the shooting in Eustis hit the television on Sunday, Appellant's mother saw the reports. (XIV 1730-31) Several months later, Angel Glenn dropped by to visit Appellant's mother. She was wearing an electronic monitor on her ankle at the time. Without provocation, Angel immediately volunteered that the twins had nothing to do with the murders in Eustis.[8] (XIV 1733-34) Appellant's niece witnessed Angel's visit and confirmed her grandmother's testimony.[9] At the time of the conversation, Appellant's niece had not heard about the murders and had no idea what Angel was talking about. (XIV

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[8] During rebuttal, the state established the time frame of Angel's visit to have occurred on or around October 15, 2006. (XIV 1756-57)

[9] During the state's case-in-chief, Angel had testified that she told Appellant's mother and niece that both Appellant and his twin brother were involved in the

1749-54)

Penalty Phase

Donte, the appellant, and his identical twin brother, Dante, lived with their mother, Louise Laster[10], until they turned eleven months old. Donte's father, James Hall, had no role in Donte's upbringing during that first year. When Donte was almost one, his mother began a relationship with a live-in boyfriend. James Hall, Donte's father, decided that he did not want another man to raise his children, so Donte went to live with his father and grandmother. That lasted until Donte turned five, when he returned to live with his mother. Donte's childhood living arrangements were very unstable, in that he was frequently bounced around from one relative to another. (XVI 129-131, 136)

Donte struggled noticeably when he entered school. Donte's learning disability was first noticed in kindergarten where he was involved in the head start program. Donte initially attended an elementary school for emotionally handicapped children. After testing revealed Donte's attention deficit disorder, school authorities placed him on Ritalin. The medication did not seem to help. (XVI 113, 131-133) School officials transferred Donte to a different school where he was placed in special education classes. (XVI 133-134)

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shootings. (XII 1358-60)

Donte's school records revealed that he was in a special education program designed for the educable mentally handicapped. In order to meet the requirements for that type of program, a student must possess intellectual functioning two or more standard deviations below the mean. Statistically, this meant that Donte had an IQ of seventy or below[11].(XVI 106-107) Specifically, Donte was two or more standard deviations below the mean which is approximately an IQ of 70 or below, plus or minus what's called a standard area of measurement which is about five points plus or minus. Donte's assessed level of adaptive behavior was below that of other students of the same age and sociocultural group. (XVI 107-108)

In layman's terms, Donte not only had deficits on intellectual testing, he had deficits in daily activities. Students had to have three things to be in the program: (1) an IQ score that's approximately seventy or below, (2)an assessment indicating that they are having problems with adaptive functioning, and (3) an assessment that they are doing poorly academically as well.(XVI 108-109)

Because of Donte's disability, his mother received a supplemental Social Security check from the federal government.(XVI 135-136) He attended special education classes throughout school and exhibited disruptive behavior. He left

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[10] Donte's mother still loves him dearly. (XVI 137)

[11] The school records did not include the original psychoeducational testing but,

school in the eleventh grade when he was sent to a juvenile justice program. He left home at the age of seventeen and worked a couple of brief, menial jobs. (XVI 104)

He began using marijuana on a daily basis at the age of thirteen. At the age of nineteen, Donte began using ecstacy and alcohol on a regular basis. He had a history of a couple of alcohol-induced blackouts. During the period of time leading up to his arrest, Donte was using ecstasy approximately every other day, several pills each day. (XVI 105) Additionally, at the time of trial, Donte was the father of a four-year-old boy. (XVI 136-137)

Dr. Eric Ming, a neuropsychologist, conducted his own testing in preparation for the trial. Dr. Ming determined Donte's full scale IQ at 76. Although this was slightly higher than Dr. Ming expected, considering Donte's school records, it was certainly consistent. Donte's score put him in the borderline range of intellectual abilities, people considered to be low-average, and within the range of mental retardation. Donte's intellectual functioning falls in the bottom fifth percentile of the population. In other words, 95% of the general population is more intelligent. (XVI 109-112)

Dr. Ming opined that Donte's limited intellect and his attention deficit

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in order to qualify for that program, Donte's IQ testing had to have that result.

hyperactivity disorder impaired his ability to control his emotions and behavior. That combination of diagnoses results in a tendency to be hyperactive and impulsive. The addition of Donte's polysubstance abuse exacerbated the problem. (XVI 113-114)

Due to the unavailability of records, Dr. Ming was unable to verify that Donte had been diagnosed with mental retardation as a child, but thought it entirely possible. His opinion was supported by the fact that Donte's mother reported receiving disability payments for him during that time, but the mother was not able to explain to Dr. Ming exactly why she received payments. At a minimum, Dr. Ming concluded that Donte's intellect is within the borderline range, approximately the bottom fifth percentile, with possibly a diagnosis of mild mental retardation. (XVI 114-115) Although Donte understood the difference between right and wrong, his capacity to conform his behavior to the constraints of the law was impaired as a result of his limited intellect, his history of attention deficit hyperactivity disorder, and probably substance-abuse. (XVI 114-115, 118-119)

State's Penalty Phase Rebuttal

Dr. Patrick Ward, a school psychologist, evaluated Donte on behalf of the state. During the clinical interview and evaluation, Donte told Dr. Ward that he began using ecstasy at the age of seventeen, but eventually gave it up after several

months, because he really didn't like the effects. (XVI 146-149) Donte reported two automobile accidents that injured his neck and back, but denied any head injuries. (XVI 150) Donte self-reported that he attended school until the eleventh grade. (XVI 151) He also reported that he attended SLD (special learning disability) classes as opposed to the EMH (educably mentally handicapped) classes. Dr. Ward explained that SLD classes are designed for special learning disability students, while EMH classes typically means that there is an intellectual handicap. However, Dr. Ward admitted that these differences are not "written in stone", and some might combine the terminologies. (XVI 151-152) Dr. Ward conceded that, depending on the criteria used by the school system, students categorized as EMH typically have an IQ below 70, as well as difficulty with adaptive functioning. (XVI 152)

Dr. Ward opined that Donte's IQ scores would place him in the borderline range, rather than mentally retarded. (XVI 153) When presented with the hypothetical of a student placed in the EMH category as a student, on disability as a child, who scores an overall 76 on the IQ test at the age of 24, Dr. Ward would not assume that the individual was mentally retarded. He believed that further investigation would need to be done. (XVI 153) School records would be the determining factor on whether Donte was in EMH classes. (XVI 156-157) Under

current Florida guidelines, a student must score at the mentally retarded range in order to be placed in EMH classes. (XVI 157)

Without objection, the state introduced two letters that Donte had written to his girlfriend from jail, prior to trial. These were offered as typical examples of Donte's ability to write, communicate, the extent of his vocabulary, and his intellect. (XVI 162-167; State's Exhibits 102-103)

Spencer Hearing

Appellant presented William Scott, a mitigation specialist with a bachelor's degree in psychology, a master's degree in counseling, and a license as a mental health counsel in the state of Florida. (V 865-67) Mr. Scott appeared at the ***Spencer*** hearing and testified despite the fact that he was not being paid for his time. Due to some medical and personal reasons, he had not been involved in the case for approximately three months. Nevertheless, he felt an obligation to appear as a volunteer and a friend of the court. (V 892). Scott did a fairly extensive examination of Appellant's family background and upbringing. (V 866-68)

Appellant's mother, Louise, was raised by two alcoholic parents. Of course, this affected Louise and her seven siblings. Because the extended family lived in the same household or in close proximity, it also affected Donte and his five siblings. Donte Hall was raised in culture of drugs, crime, and alcoholism. His

mother was addicted to powder cocaine before becoming addicted to crack cocaine. She was unable to care for Donte and his twin brother due to her addiction. The grandfather's alcoholism resulted in physical and verbal abuse toward Donte. Additionally, Donte's two older brothers and his uncles, set role models of unemployed drug dealers and criminals. Donte's father was in prison for most of his Donte's childhood. (V 869-81) Additionally, Donte's neighborhood was inhabited by similar drug-addicted criminals. (V 875)

Scott discovered that Donte's mother eventually revealed that Donte crawled backwards, wrote backwards, and drew backwards for the first three years of his life. Although he had twenty-five years in the mental health counseling area, Scott had never heard of anything like it. He consulted other experts in the field who found that condition to be very rare. It spoke of a cognitive dysfunction which would affect Donte's ability to make good judgments, engage in critical thinking, process information, deal with problems, and deal with other people.
While most mothers would have sought medical attention, Donte's mother did not. (V 882-86) Instead, she thought it was cute.

Donte's cognitive deficiency impacted his education. He attended ten schools between the time he was in first grade and the time he quit school in the eleventh grade. The reason for the numerous changes in his schooling was an

attempt by the school system to deal with his problems and behavior. (V 887-88) Eventually he was sent to schools and classes that only someone with bono fide retardation could attend. The school system chose to treat Donte's problems much like his mother did. They simply moved him to the next grade (usually at a different school), until he finally quit school in the eleventh grade. Scott was certain that Donte was incapable of doing eleventh-grade work. In fact, Scott doubted that Donte could successfully complete second-grade curriculum. (V 886-91) Scott's investigation of Donte's educational history revealed that Donte is a borderline retarded. (V 892-97) Before it became politically incorrect, society would have called Donte a simpleton, a half-wit, an imbecile, or a moron. (V 881)

Scott emphasized that Donte's mother was never there when he needed her. She was not there when he was growing up. She also was not there for his ***Spencer*** hearing. While Scott was talking to her in preparation for the hearing, he asked her to come to the hearing. She declined, saying that it would not be "in her best interest". She did not want to listen to the negative evidence about Donte and her family. Scott unsuccessfully attempted to persuade her, pointing out that she could substantiate much of his testimony. (V 891-92) Donte's biological father also failed to appear for his son's ***Spencer*** hearing. (V 897-98)

In conclusion, Dr. Scott told the trial court:

I'm asking that the Court understand who Donte is. He's a borderline retard, a backward-crawling baby, a child that grew up in what I would consider a swill-pit of inner-generational drug use, a boy that grew up engulfed in inner-generational crime, chronically abused and neglected all of his life, a child and adolescent tested and placed into classes for the retarded, a borderline problem with no control and nogenetically predetermined way to prevent failure or dropping out of school, and with a childhood and adolescence marked by absentee parents and role models who taught him the easy way is the best way. Those were the odds against Donte Hall. And I don't know what we could ever expect of him except to grow up to be a criminal.

Now, we might ask ourselves, was he insane or psychotic at the time of the crime? And my answer is, probably not. Is he so completely retarded as to being incapable of self-care? And that answer is no. Does he know the difference between right and wrong in complex situations? I would seriously doubt it. We know that the way people think and act and behave is the sum total of the effect of their nature and their nurture.

The way they were raised and the environment they were raised in and their genetic makeup will cause people to have blue eyes and others to have brown, some to be as smart as Einstein and others borderline retarded like Donte.

And in closing I want to submit to the Court for consideration my belief that whatever the defendant did, whatever he will do in the future, Donte Hall did not inherit a level of intellectual ability making him capable of normal, adult critical thinking, the kind of thinking that leads to right choices. Given his diminished intellect, I believe that Donte's chance of making a correct, moral choice is like flipping a coin. All is left to chance.

(V 898-99)

SUMMARY OF ARGUMENT

Appellant contends on appeal that the trial court erred in finding that the murder of Anthony Blunt was especially heinous, atrocious, or cruel, as defined by this Court's longstanding jurisprudence. This case is one of a garden- variety, felony murder. Appellant and his confederates entered a home, robbed the victims at gunpoint, and quickly shot the victims before fleeing with the loot. One victim died immediately from a gunshot wound to the head. The trial court submitted only three potential aggravating factors for the jury's consideration for the murder of Kison Evans. Because all parties agreed, the trial court did not instruct the jury that they could consider that the murder of Kison Evans was especially heinous, atrocious or cruel. The jury unanimously found all three to be applicable. However, the jury recommended a life sentence for the murder of Kison Evans, which the trial court subsequently imposed.

In contrast, over objection, the trial court instructed the jury that they could consider that the murder of Anthony Blunt was especially heinous, atrocious or cruel. The jury recommended a death sentence for the murder of Anthony Blunt by a close vote of eight to four. Because interrogatory verdicts were used at the penalty phase, the record reflects that the jury found, by an eleven to one margin, that the murder of Anthony Blunt was especially heinous, atrocious, and cruel.

Hence, it is clear that the jury's erroneous conclusion that the murder of Anthony Blunt, unlike the murder of Kison Evans, was especially heinous, atrocious, and cruel was the difference between their life recommendation for the first murder and the death recommendation for the second murder. Appellant objected to the trial court instructing the jury on this inapplicable aggravating factor, because it was not supported by this Court's legal precedent. Barring the consideration of this inapplicable aggravator, the jury would have undoubtedly also recommended life imprisonment for the murder of Anthony Blunt as well.

Appellant also argues that his death sentence is disproportionate. The trial court gave great weight to its finding that the murder of Anthony Blunt was especially heinous, atrocious or cruel. The evidence does not support the finding of this aggravating factor. Without it, when weighed against the substantial mitigation, a life sentence is more appropriate.

Appellant also urges this Court to reconsider its prior holdings in the rejection of the applicability of ***Ring v. Arizona***[12] to Florida's death sentencing scheme.

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[12] ***Ring v. Arizona***, 536 U.S. 584 (2002).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND ALSO FINDING THAT
THE MURDER OF ANTHONY BLUNT WAS
ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

In finding this particular aggravating circumstance, the trial court wrote[13]:

> The Florida Supreme Court has held that the heinous, atrocious or cruel (hereinafter "HAC") aggravator applies "only in torturous murders-those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." ***Rose v. State***, 787 So.2d 786, 801 (Fla. 2001)(quoting ***Guzman v. State***, 721 So.2d 1155, 1159 (Fla. 1998)). In ***Lynch v. State***, 841 So.2d 362, 369 (Fla. 2003) the Florida Supreme Court explained that in considering the HAC aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused to the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. ***See Farina v. State***, 801 So. 2d 44, 53 (Fla. 2001) (citation omitted); ***James v. State***, 695 So.2d 1229, 1235 (Fla. 1997)("fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.")(citations omitted); ***Swafford v. State***, 533 So.2d 270, 277 (Fla. 1988)("the victim's mental state may be evaluated for purposes of such determination in accordance with the common-sense inference from the circumstances.") (citations omitted).
>
> The Florida Supreme Court has repeatedly disapproved HAC for gunshot murders that were unaccompanied by other circumstances

[13] The indictment misspelled one of the victim's name this as "Keson". The correct spelling is actually "Kison". The trial court's findings of fact reflect the misspelling.(VI 19)

showing that the killing was conscienceless or pitiless and unnecessarily torturous to the victim, i.e., committed in a manner exhibiting utter indifference to or enjoyment of the suffering of another. ***See, e.g., Diaz v. State***, 860 So.2d 960, 967 (Fla. 2003)(determining that competent, substantial evidence did not support a HAC finding for murder carried out quickly and without intent to inflict a high degree of pain or otherwise torture the victim); ***Rimmer v. State***, 825 So.2d 304, 328-29 (Fla. 2002)(evidence did not support HAC where the record did not reveal that the defendant tortured the victims or subjected them to pain and suffering);***Ferrell v. State***, 686 So.2d 1324, 1330 (Fla. 1996)("Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim."); ***Robinson v. State,*** 574 So.2d 108, 112 (Fla. 1991)(holding that the trial court erred in finding HAC because the fatal shot to the victim "was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence that it was committed 'to cause the victim unnecessary and prolonged suffering'")(citation omitted). The Florida Supreme Court has stated that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel. ***Lewis v. State***, 398 So.2d 432, 438 (Fla. 1981).

In his Sentencing Memorandum, the Defendant argues that this aggravator posed the only difference between the jury's life recommendation for Keson Evans' death and the jury's death recommendation for the killing of Mr. Blunt. The Court notes that according to the medical examiner, Mr. Evans may not have died immediately due to the gunshot wound to the head, but for sure it rendered him unconscious. The Defendant also argues that the State failed to meet its burden because there is no evidence suggesting that this murder meets the statutory requirements of the HAC definition. Moreover, the defendant contends that there is no evidence that the actual commission of the murder was accompanied by such additional acts as to set the crime apart for [sic] the norm of capital felonies. In addition, the Defendant maintains that there is a complete lack of evidence that he intended that the victim suffer a torturous death by exhibiting a desire to inflict a high degree of pain or an utter

indifference to or enjoyment of Mr. Blunt's suffering. He contends that the fact that Mr. Blunt made statements indicating that he was aware that he might die or that there were multiple gunshot wounds cannot establish that the Defendant intended to cause the victim unnecessary and prolonged suffering.

This Court respectfully disagrees and concludes that the circumstances surrounding Mr. Blunt's death support a finding of the HAC aggravator. Although no testimony conclusively established that bullets from the Defendant's AK-47 were recovered from Mr. Blunt's body, the evidence overwhelming [sic] established the Defendant's significant role in the crimes committed. Nikita Jackson testified that the Defendant was the first to fire his weapon. Willie Shelton testified that the man with the AK-47, i.e., the Defendant, was the one giving the orders to the other robbers. Jimmie Lee Rucker testified that the man with the AK-47 was the first to shoot JD. Angel Glenn testified that the Defendant was the first robber to enter the home. She testified that he threatened the people by telling them "...we're going to make this choppa [gun] dance..." Thus, this Court concludes that: (1) the Defendant was present at the scene of the crimes; (2) he was intimately involved in committing the crimes; (3) he exercised the primary leadership role; (4) he was the primary planner;[A] (5) he was far more than an equal participant; and (6) he fired his weapon at least four times. This court notes that this is not like the situation in ***Omelus v. State***, 584 So.2d 563 (Fla. 1991) or in ***Williams v. State***, 622 So.2d 456 (Fla. 1993) where the defendant was not present and did not know how the murder would be accomplished. Like the defendant in ***Cave v. State***, 727 So.2d 227 (Fla. 1999), the Defendant was a "ringleader" if not the ringleader".

This Court must next consider whether the facts of this murder support the finding of HAC. Dr. Christina Roberts, the medical examiner who performed an autopsy on Anthony Blunt, testified that Mr. Blunt had a number of wounds. The first wound entered his chest and severed his inferior vena cava, a major blood vessel. The second wound was in his right thigh, and the third wound was to his left hand. Dr. Roberts testified that none of the wounds would have rendered Mr. Blunt unconscious immediately. She also testified that Mr. Blunt

would have suffered significant pain as a result of each of his wounds.

> Willie Shelton testified that after Mr. Blunt was shot, he heard him yell many times "Please, please, please help me, please help me." Mr. Blunt also said "Please don't take me, someone help me." George Davis, a Lake County EMS, testified that the victim was conscious when he arrived on the scene. He was moaning and groaning and suffering from shortness of breath. Jerry Andrews, a Lake County EMS, testified that he could tell immediately that Mr. Blunt was critical and exhibited heavy breathing and sweating. Andrews testified that he would classify Mr. Blunt as being in serious distress. He stated that it was hard to understand everything he was saying but he did ask him to help and told him that he was hurting. When asked, Mr. Blunt told the paramedic that he hurt mainly in his chest.
>
> This Court finds that the evidence supports the conclusion that the Defendant's actions demonstrated a marked indifference to the suffering of Mr. Blunt. In determining whether this aggravator applies, Mr. Blunt's perceptions are the controlling criteria. The evidence clearly established that the victim suffered extreme physical pain as well as severe emotional distress because of his wounds. Clearly, Mr. Blunt was aware that he might die as a result of his wounds. It is not unreasonable to conclude that he knew he was dying. He likewise was aware that others were shot, thus heightening his terror of the potential result. This Court finds that the State proved this aggravator beyond a reasonable doubt and accords it great weight.
>
> [A] The evidence demonstrated that the idea of the robbery originated with the defendant, he recruited participants other than Ms. Glenn, and he developed and carried out the strategy.

(III 511-515) At trial, Appellant unsuccessfully objected to the trial court giving the instruction, contending that the evidence did not support it. (XVI 54, 138-44)

This Court has stated that its review of a trial court's finding of an

aggravating factor is limited to determining whether the trial court applied the right rule of law and, if so, whether competent, substantial evidence supports its finding. ***Way v. State***, 760 So.2d 903, 918 (Fla. 2000). This Court has also held that "an instantaneous or near-instantaneous death by gunfire does not satisfy the aggravating circumstance of heinous, atrocious, or cruel". ***Robinson v. State***, 574 So.2d 108, 112 (Fla. 1991).

As even the trial court recognized, this Court has **repeatedly** disapproved a finding of this aggravating circumstance for gunshot murders that are unaccompanied by other circumstances showing that the killing was conscienceless or pitiless and unnecessarily torturous to the victim, i.e., committed in a manner exhibiting utter indifference to or enjoyment of the suffering of another. (III 530) The trial court **appropriately** cites to five applicable cases (***Diaz v. State***, ***supra; Rimmer v. State***, ***supra; Ferrell v. State, supra; Robinson v. State, supra;*** and ***Lewis v. State, supra;*** where this Court has disapproved a trial court's finding of the EHAC[14] aggravator in murders committed by shooting, when it is ordinary, in the sense that it is not set apart from the norm of premeditated murders. (III 530-531) Inexplicably, the trial court then concludes that brought murder **was** especially heinous, atrocious or cruel.

---

[14] Especially heinous, atrocious, or cruel.

Anthony Blunt's murder was a classic felony murder that occurred during the course of a robbery. The robbery and shooting occurred in a matter of minutes (probably less than five). The assailants were initially present for only a couple of minutes. The victims certainly thought this was a mere robbery which would be over in a matter of minutes, if they cooperated. This conclusion is supported by the multitude of witnesses who testified that nobody resisted ("bucked the jack") in any manner whatsoever. No one expected to get shot, much less killed.

The circumstances surrounding Anthony Blunt's murder are remarkably similar to cases where this Court has found that the trial court erroneously found the EHAC factor. A case precisely on point is ***Teffettler v.State***, 439 So. 2d 840, 843 (Fla. 1983), where the robbery victim was hit with one shotgun blast to the midsection. The victim "sustained massive abdominal damage due to the shotgun blast but remained conscious and coherent for about three hours. He was given emergency aid both at the scene and at the hospital." "The doctors described [the victim's] initial cry that he was 'going,' coupled with the statements from attending [doctors]...that terminal patients on the 'final glidepath' are aware of their impending death and that the doctors believed, given the nature of the wound and [the victim's] lucidity, that [he]...knew he was dying...". ***Id.*** This Court went on to conclude that the EHAC aggravating circumstance was erroneously found by

the trial court.

Here, we know that the victim was in pain and suffering for some period of time, certainly less than the three hours that the victim in ***Teffettler*** "remained conscious and coherent**".** In fact, the circumstances in ***Teffettler*** are much more egregious and clear-cut than those in Appellant's case. Although Blunt was clearly in distress and pain, medical personnel assured him that they would do what they could for him. Unlike the victim in ***Teffettler,*** there is no indication that Bunt knew he was going to die, only that he did not want to die. There is no indication that Blunt did not believe that the medical personnel would save his life.

If this Court concludes that the EHAC aggravator applies to the facts of Appellant's case, the Court must recede from the holding in ***Teffettler .*** To do so would render the aggravating circumstance meaningless in narrowing the class of death-eligible defendants who commit first-degree murder. If this Court makes that choice, the constitutionality of Florida's death-sentencing scheme will definitely be called into question. ***Amend. VIII and XIV, U.S. Const.***

The trial court appears to base its conclusion on the fact that Anthony Blunt did not die immediately from his gunshot wounds. At the penalty phase, Travis Jicha, one of the first responding officers to the scene, described Blunt sitting on the couch in pain. He kept moving trying to get comfortable. He told the attending

medical personnel, “Please don’t let me die.” (XVI 88-95)

Testimony at the guilt phase revealed that Blunt as a result of chest wound that resulted in the perforation of the inferior vena cava and the abdomen. Blunt also suffered a second wound in his right thigh and a third wound to his left hand.(IX 792-94) As the trial court noted in his findings, Blunt repeatedly called for medical help. Blunt was conscious and moaned and groaned as he suffered from shortness of breath. Medical personnel agreed that he was critical and in serious distress. (III 533) Although Blunt clearly suffered pain, Appellant reiterates that there is nothing that sets Blunt’s murder apart from the norm of gunshot killings.

In its findings of fact, the trial court concedes that the evidence does not conclusively support the fact that any of the shots fired by Appellant struck Blunt. (III 531) In light of that conclusion, counsel fails to understand how the trial court concluded that Appellant deliberately intended to inflict a high degree of suffering or pain, as this Court’s precedent requires. Appellant may have been the ringleader, but there is no evidence whatsoever that he **intended** for Blunt to suffer. See, e.g., ***Ibar v. State***, 938 So.2d 451 (Fla. 2006); ***Chamberlain v. State***, 881 So.2d 1087 (Fla. 2005); ***Diaz v. State***, 860 So.2d 960 (Fla. 2003); ***Belcher v. State***, 851 So.2d 678 (Fla. 2003); and ***Shere v. State***, 579 So.2d 86 (Fla. 1991).

In ***Green v. State***, 641 So. 2d 391, 396 (Fla. 1994), this Court also struck this aggravator even where:

> This aggravating factor is reserved for "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The additional acts accompanying Flynn's death-Flynn knew Green had a gun, his hands were tied behind his back, and he was driven a short distance to the orange grove-do not turn this shooting death into the " 'especially' heinous" type of crime for which this aggravator is reserved. See Tedder v. State, 322 So.2d 908, 910 (Fla.1975).

In ***Buckner v. State***, 714 So. 2d 384, 390 (Fla. 1998), this Court held:

> Next, we address the factor of HAC. In order for the HAC aggravating circumstance to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim. Hartley v. State, 686 So.2d 1316 (Fla.1996), cert. denied, 522 U.S. 825, 118 S.Ct. 86, 139 L.Ed.2d 43 (1997); Richardson v. State, 604 So.2d 1107 (Fla.1992). Only when a murder evinces extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another is a finding of HAC appropriate. Cheshire v. State, 568 So.2d 908 (Fla.1990). In this case, the entire episode took only a few minutes and no evidence reflected that Buckner intended to subject the victim to any prolonged or torturous suffering. See, e.g., Hamilton v. State, 678 So.2d 1228 (Fla.1996) (fact that gun was reloaded does not, without more, establish intent to inflict high degree of pain or otherwise torture victims); Brown v. State, 526 So.2d 903 (Fla.1988) (no HAC where victim shot in arm, begged for life, then shot in head). Consequently, we conclude that the trial judge erred in finding the murder to be HAC.

In ***Brown v. State***, 526 So.2d 903, 907 (Fla. 1988)[abrogated on other grounds in

Fenelon v. State, 594 So.2d 292(Fla. 1992)], this Court also struck this aggravator under similar circumstances:

> In this case, the evidence indicated that the fatal shots came almost immediately after the initial shot to the arm. The murder was not accompanied by additional acts setting it apart from the norm of capital felonies and the evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering. See Gorham v. State, 454 So.2d 556, 559 (Fla.1984), cert. denied, 469 U.S. 1181, 105 S.Ct. 941, 83 L.Ed.2d 953 (1985); Lewis v. State, 377 So.2d 640 (Fla.1979). We therefore conclude that this crime was not "especially heinous, atrocious or cruel" as defined in Dixon.

This Court has repeatedly made clear, that a gunshot homicide, as a matter of law, cannot be found to be "especially heinous, atrocious or cruel" within the meaning of the aggravating factor, except where the evidence proves that the defendant "intended to cause the victim unnecessary and prolonged suffering." ***See, e.g. Kearse v. State***, 662 So.2d 677, 686 (Fla. 1995). The trial court's finding of this particular aggravating factor was erroneous in that it was not supported by substantial competent evidence. The trial court's action in instructing the jury on this factor, over objection, tainted the jury's recommendation and renders Appellant's resulting death sentence to be unconstitutional. ***Art. I, §§ 9 & 16; Amends. VI, VIII, XIV, U.S. Const.***

POINT II

THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND THE MITIGATION IS SUBSTANTIAL.

This was a senseless murder committed by a mentally and emotionally disturbed young man who was unable to cope rationally with an adult situation. He was the product of a dysfunctional family who had no skills in the raising of children. His only role models were criminals, alcoholics, and drug addicts. He was the product of a school system that could not deal with his handicap. His intelligence is certainly below-average, and he may be borderline retarded. The trial court erroneously found one aggravating circumstance, that the jury also inappropriately considered. ***See Point I.*** Additionally, the jury did not hear all of the evidence regarding Appellant's dysfunctional upbringing. Much of this was heard only by the trial court at the ***Spencer*** hearing. In spite of that, the jury recommended death by little more than a bare majority. Appellant's crime is not one of the most aggravated and least mitigated first-degree murders committed in this state. When compared to similar cases involving the death penalty, the ultimate punishment is not warranted.

As this Court repeatedly has stated, the death penalty must be limited to the

most aggravated and least mitigated of first-degree murders. ***See e.g., Offord v. State***, 959 So.2d 187 (Fla. 2007); ***Almeida v. State***, 748 So. 2d 922 (Fla. 1999) (crime must fall "within the category of both the most aggravated and least mitigated of murders"); ***Terry v. State***, 668 So. 2d 954, 965 (Fla. 1996) ("Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist"); ***Kramer v. State***, 619 So. 2d 274, 278 (Fla. 1993) ("Our law reserves the death penalty only for the most aggravated and least mitigated murders"); ***State v. Dixon***, 283 So. 2d 1, 7 (Fla. 1973) (death penalty is reserved for "the most aggravated and unmitigated of most serious crimes").

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review "requires a discrete analysis of the facts, entailing a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." ***Urbin v. State***, 714 So. 2d 411, 416 (Fla. 1998) (quotations and citation omitted; emphasis in original); ***Offord v. State, supra*** at 191. Proportionality analysis requires the Court to "consider the totality of circumstances in a case," in comparison to other capital cases. ***See Porter v. State***, 564 So. 2d 1060 (Fla. 1990). The Court must compare "similar defendants, facts, and sentences." ***Brennan v.***

State, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is ***de novo***. ***See Larkins v. State***, 739 So. 2d 90 (Fla. 1999); ***Urbin, supra***.

Appellant concedes that three valid aggravators were found by the trial court. However, the trial court's finding that the murder was especially heinous, atrocious or cruel cannot stand. ***See Point I***. Two of the valid aggravating circumstances are found in almost every robbery resulting in the death of the victim, i.e., pecuniary gain and prior violent felony conviction. The latter aggravating circumstance was based completely on the contemporaneous crimes committed during that five-minute interval on that fateful night. The only aggravating factor that sets this murder apart from other first-degree murders is the number of shots fired and the number of potential victims in the immediate area. However, Appellant submits that, this alone, when weighed against the substantial mitigation, some found and some ignored by the trial court, should result in a reduction of Appellant's sentence to life imprisonment without parole.

The trial court did find that Appellant's capacity to conform his conduct to the requirements of the law may have been **somewhat** impaired. (III 533-35) The court expressed some doubt about the evidence, but accorded this mitigator **some** weight. The trial court focused on the testimony of Dr. Mings' inability to quantify his opinion, where Appellant continued to deny his involvement in the crime. The

court instead focused on Appellant's ability to plan the robbery and lead his confederates in its execution.

Despite the trial court's admiration of Appellant's ability to plan a robbery, counsel submits that the ease with which police were able to solve this crime reveals a very inept, bungled, robbery "gone bad". Although the trial court states that he considered the testimony of Dr. Scott at the ***Spencer*** hearing, it is abundantly clear that critical testimony was not taken into account. As Dr. Scott explained, due to his diminished intellect, Appellant's chance of making a correct, moral decision in a complex situation would be akin to flipping a coin. (V 898-99)

Similarly, the trial court erroneously decline to accept Appellant's age (22) as a mitigating factor. (III 535-36) The trial court cites all of the applicable case law, but comes to the wrong conclusion. The record is replete with Appellant's enormous difficulty in school. He was placed in special classes and transferred to a different school each and every year. This was due to his mental deficiencies. There was some confusion whether Appellant suffered from a mere learning disability, or was actually borderline retarded. Either way, Appellant's relatively young age is clearly linked with "some other characteristic of the defendant or the crime such as immaturity." ***Mahn v. State,*** 714 So. 2d 391, 400 (Fla. 2001).

The trial court also gave short shrift to Appellant's dysfunctional family

background. Despite the extensive evidence of Appellant's intergenerational alcohol and drug use, a completely absent father, and inappropriate role models, the trial court seemed reluctant to even consider this as mitigation. The trial court wrote, "Although no evidence was offered as to how this directly or indirectly influenced the Defendant's behavior in committing this crime...", he realizes that this Court has held that exposure to this type of behavior, "in some way..." ameliorates the enormity of a defendant's guilt. The trial court appears to reluctantly give this powerful mitigating evidence "some weight." (III 539-40)

The trial court treats Appellant's unstable living arrangements as a child in a similar manner. (III 540-41) While acknowledging Appellant's absent father, drug-addicted mother, and placement with many different relatives, the trial court nevertheless concludes that, "No one testified that the Defendant suffered any negative aspects from these changes in the Defendant's residence or how this influenced him." ***Id.*** The trial court thus affords this powerful mitigating evidence only "minimal weight."

Finally, the trial court addresses Appellant's attention deficit disorder as well as the fact that Appellant is considered borderline mentally retarded. (III 541-43) Dr. Mings and Dr. Scott both testified about Appellant's special education program where he attended special classes for low-functioning children. Appellant's

intelligence fell between low average and mentally retarded. Dr. Mings placed Appellant in the bottom 5% of the population in terms of intelligence. Appellant's behavioral problems were exacerbated by his polysubstance abuse. School tests placed Appellant in classes for the mentally retarded.

After detailing this powerful mitigation, the trial court points out that, of all the potential mitigation, this had the potential for the most impact on Appellant's crimes. Nevertheless, the trial court inexplicably concludes that Appellant's behavior and decision making on the night of the murder, "reflect someone who was in no way handicapped by such infirmities." (III 543) Appellant submits that the trial court's conclusion reveals a basic misunderstanding of mitigating evidence. Appellant made impulsive and extremely immature decisions that fateful night. That was the ultimate product of all of the dysfunction that made Appellant what he became.

The death sentence in this case is thus disproportionate. Just as this Court ruled in ***Offord, supra*** at 193-194:

> As this Court observed over 34 years ago in ***Dixon***:
>
> > It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty-each step providing concrete

> safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

283 So.2d at 7. The final step is the mandatory review by this Court, which we found was one indication of "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes." ***Id***. at 8. For all the reasons we have explained, we conclude that this is not among "the most aggravated and unmitigated of most serious crimes" for which the death penalty is reserved. ***Id***. at 7. Imposition of the death penalty would thus be a disproportionate punishment. We therefore vacate the death sentence and remand for the imposition of a life sentence without the possibility of parole.

So here, too, for all the foregoing reasons, this is simply not among "the most aggravated and unmitigated of most serious crimes" for which the death penalty is reserved. ***Id***. Imposition of the death penalty would thus be a disproportionate punishment.

POINT III

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel unsuccessfully challenged the constitutionality of Florida's Capital Sentencing Scheme arguing, ***inter alia***, that it violated Appellant's ***Sixth Amendment*** rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002), and was unconstitutional under ***Caldwell v. Mississippi***, 472 U.S. 320 (1985). **See, e.g.** (I 81-89, 157-59, 162-78; IV 734-37) For the most part, these challenges were unsuccessful. Appellant was ultimately sentenced to death. The jury was repeatedly instructed and clearly understood that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge. **See, e.g.** (XVI 67,194-96,199, etc.) The words"advisory" and "recommendation" are found repeatedly, in jury selection, jury instructions, and counsel's argument.

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the ***Sixth Amendment*** even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a ***Sixth*** Amendment challenge. ***See,***

e.g. Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), ***cert. denied***, 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, Appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

Appellant points out that the jury recommendation for his death sentence was not unanimous. However, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's ***Sixth*** **Amendment** role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***.

Since the jury did, at Appellant's request, make specific findings as to aggravating and mitigating factors, we are able determine that the jury was unanimous in their finding of three of the aggravating factors, but not unanimous in their finding that the murder was especially heinous, atrocious or cruel.(XVII 221) Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

Furthermore, the vote for death was far from unanimous, almost a bare majority (8 to 4).

At this time, Appellant asks this Court to reconsider its position in ***Bottosom*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate Appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.***

CONCLUSION

BASED UPON the foregoing cases, authorities and policies, Appellant requests this Court to vacate Appellant's death sentence and remand for the imposition of a life sentence without the possibility of parole.

Respectfully submitted,
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SEVENTH JUDICIAL CIRCUIT

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand-delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Donte Hall, #X45131, Florida State Prison, 7819 NW 228th St., Raiford, FL 32026, this 7th day of September, 2010.

_____
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, 14 pt.

_____
CHRISTOPHER S. QUARLES
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