IN THE SUPREME COURT OF FLORIDA

MICHAEL MULUGETTA YACOB,

Appellant,

v. **CASE NO. SC11-2505**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FOURTH** JUDICIAL CIRCUIT,
IN AND FOR **DUVAL** COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

MICHAEL MULUGETTA YACOB,

Appellant,

v. **CASE NO. SC11-2505**
L.T. CASE NO. 10-CF-3188

STATE OF FLORIDA,

Appellee,
_____/

STATEMENT OF THE CASE AND FACTS[1]

Procedural History

On March 25, 2010, the Duval County Grand Jury indicted appellant, Michael Yacob, for first-degree murder and armed robbery in the death of Moussa Maida at the Snappy Food Store on Trollie Lane in Jacksonville. R1:1-3.

Yacob was tried by jury before Duval County Circuit Judge Adrian G. Soud on October 3-6, 2011.

The jury found Yacob guilty on both counts and that Yacob carried, possessed, and discharged a firearm causing death or great bodily harm. As to his conviction of first-degree murder, the jury found Yacob guilty, by special verdict, of both

[1] The first seven volumes of the fifteen-volume record on appeal, comprising the pleadings and motion hearings, are designated by the letter "R," followed by the volume number and page number. The remaining eight volumes, comprising the guilt and penalty phase transcripts, are designated by the letter "T," followed by the volume number and page number.

premeditated and felony murder. R3:598-600, R4:601-602, T13:1052-1053.

Prior to the penalty phase, defense counsel informed the trial court that Yacob wished to waive the presentation of mitigation testimony by his family members. R6:1073. The court conducted a Koon[2] inquiry to determine whether Yacob's waiver was knowing and voluntary. R6:1073-1081, 1091-1095. Defense counsel requested the defense be allowed to present to the jury the unsworn videotaped testimony of three mitigation witnesses who lived in Seattle, R6:1061, and the testimony of the defense investigator, David Douglas, who interviewed the mitigation witnesses. R6:1084-1085. The trial court denied the request to present the videotape, R6:1068, and ruled that Douglas could testify only to those matters within his personal knowledge. T14:1214-1220.

The penalty phase was held on October 18. The state presented the victim impact testimony of three of Maida's family members. The defense presented the testimony of the defense investigator, David Douglas, as limited by the trial court's ruling. The jury recommended death by a vote of 10 to 2. R4:691, T15:1377.

On November 18, the trial court held a Spencer hearing. Yacob again waived the presentation of mitigation testimony by

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

his family members. The trial court admitted into evidence the videotape of the Seattle mitigation witnesses, which included Yacob's mother, his paternal grandmother, two former teachers, and the assistant principal at Yacob's former high school. The trial court also admitted into evidence the deposition of David Douglas. The state submitted a judgment and sentence for aggravated assault, which arose from a 2001 schoolyard fight and resulted in an adjudication of delinquency and sentence of probation. The trial judge noted that he had received a presentence investigation report (PSI) dated November 14.

On December 5, the trial court sentenced Yacob to death for the murder, finding one aggravating circumstance, committed during a robbery/pecuniary gain.[3] In mitigation, the trial court found Yacob's age of 22 (no weight); Yacob emigrated from a foreign country (slight weight); Yacob is intelligent and graduated from high school (slight weight); Yacob did not harm anyone else in the store (little weight); Yacob loves his family and his family loves him (slight weight). The trial court rejected as not established that Yacob was in a panic during the robbery/murder and that Yacob initially left the cashier's enclosure without hurting anyone. The trial court rejected as not mitigating and not relevant to the nature or circumstances

[3] The trial court concluded the aggravator of pecuniary gain merged with the robbery and thus "are to be considered as one." R5:912.

of the felony-murder that "everyone believed the glass was bulletproof and Yacob didn't know he had killed anyone." The trial court rejected as not mitigating that Yacob exhibited appropriate behavior at trial and that society can be protected by a life sentence. The trial court rejected as not established "due to the hearsay nature of such evidence" the mitigating circumstances presented through the mitigation videotape, David Douglas's deposition, and the PSI, which included: (1) Yacob was a diligent student who overcame academic challenges; (2) Yacob is a hard worker; (3) Yacob was raised in a religious home and has faith in God; (4) Yacob was abandoned by his father in a critical time of his development, was torn between two parents, and was abused by his father; (5) Yacob didn't have friends growing up; (6) Yacob came to the defense of a boy being bullied; (7) Yacob is a respectful and obedient person. R5:902-934. The sentencing order is attached herein as Appendix A.

Notice of appeal was timely filed June 9, 2011. R6:1067.

Guilt Phase

On May 4, 2008, Moussa Maida was shot to death during a robbery at the Snappy Food Store, where Maida worked.

At trial, the state presented surveillance video footage of the robbery and shooting from four cameras. See State's Exhibit 22. Camera 1 showed a car drive past the store and park across the street shortly before 8 a.m. A few minutes later, Maida

arrived at the store. A couple of minutes later, the store's "Open" sign lit up in the front window, and an individual exited the car parked across the street, walked across the street, and entered the store. Cameras 2 and 3 showed what occurred inside the store. One camera was directed towards the inside of the enclosed cashier's area, the other camera was directed towards the area just outside the cashier's enclosed area.[4] These videos showed Maida walk into the cashier's area, attend to some matters briefly, and walk back outside the enclosed area. The robber entered the store, walked down the aisle to the right, and then walked back to the front, where he confronted Maida at gunpoint outside the enclosed cashier's area, demanding, "money, money." The robber was dressed in a bulky camo jacket, his head and face were covered with a hoody and some kind of mask, he held the gun in his right hand, and he wore a plastic orange glove on his left hand. Both men went into the enclosed cashier's area, and with the robber pointing the gun at him, Maida removed money from the register and placed it in a white plastic bag. When the robber said, "safe," Maida knelt down and pulled money from underneath the counter and placed it in the bag. The robber again said, "safe, safe," and Maida said, there's no safe, that's all the money, and placed his hands on

[4] As you enter the front door, the enclosed cashier's area is to the left. The door to the cashier's area is at the far end of the enclosure, away from the front door.

the floor in front of him on the floor. The robber grabbed a phone that was lying on the counter and demanded, “CD, CD.” At this time, chimes sounded, indicating that someone was entering the store. Yacob stepped forward and looked out the cashier’s window, then turned back to Maida. Maida told him, there’s no CD, and handed him the remote, still kneeling on the floor. As the robber walked out the cashier’s door and around to the front of the counter, Maida stood up. The robber placed the gun in his pocket and was heading towards the front door as Maida walked through the enclosed area towards the cashier’s door. Maida reached back and hit the switch that locked the front door, as the robber walked directly across from him outside the enclosed area. The robber observed Maida’s movement, raised his gun in the air, and Maida and the robber both rushed towards the cashier’s door. Maida shut the door, and was fiddling with the lock, standing directly in front of the door, when the robber shot once, hitting the door frame. The robber dropped the bag of money on the floor, fired another shot at the door, and walked back towards the front door. Maida, who had not moved after the first shot, turned around after the second shot, which penetrated the glass and struck him in the chest, and then walked away from the door. Maida screamed twice, as the robber neared the front door, and fell to the ground. The robber then ran back to pick up the money, which was still on the floor in

front of the cashier's door, fired another shot,[5] and headed back to the front door. Unable to open the locked door, the robber ran in front of the counter, yelling to Maida, "open the . . . door, open the . . . door." By this time, Maida was lying on the floor, dying. The video showed the robber frantically trying to get out through the locked front door. He shot the door three times, put the bag of money on the lottery counter, where it fell off, spilling the money on the floor, and kicked at the glass and tugged on the burglary bars. He walked around, stuffed some of the money that was on the floor into his jacket, put the gun on the lottery counter, and continued shaking and kicking at the door. Eventually, he grabbed the gun and squeezed out under the burglary bars, ran across the street, and entered the waiting car, which drove off. Camera 6 showed a customer entering the store when the robbery was almost over. The customer entered, turned to the right and walked down the aisle, unaware that a robbery was taking place. As the customer walked back towards the front of the store, a shot rang out, and the customer turned and ran back down the aisle. After the robber left the store, the customer approached the front of the

[5] It's unclear whether this shot was fired intentionally or accidentally. It looks like the shot was fired towards the floor as the robber was reaching down to pick up the plastic bag of money.

store, calling, “Mike, Mike,” then exited through the front door by sliding under the burglar bars. State’s Exhibit 22.

Anthony Hardy, the customer who entered the store during the robbery, also testified. Hardy said he entered the store and walked down the aisle to the right to get a bottle of water. He didn’t notice anything taking place in the cashier’s enclosure. He was walking back to pay when he heard a gunshot. He ran to the back of the store and crouched down behind the aisle. He heard another gunshot and saw a man running to the door. Hardy’s view was obstructed but he could see the man’s back and that he was wearing a camo jacket with a hood over his head. The man ran to the front door and the door wouldn’t open, then ran to the “blind side” to try to get Mike to open the door, saying “Open the f— door.” He went to the front door again, kicked it, and started shaking it. He ran in front of the counter and shot again. He ran back to the door, shot the door, and started prying the burglar bars back so he could kick the glass where he had shot at it. He kept kicking, the window gave way, and he crawled out under the bars. When the coast was clear, Hardy followed the man out the front door and yelled at people to call 911. Hardy went back inside to help Maida but couldn’t get into the cashier’s area because the door was locked. T10:483-510.

Detective Cayenne, the first officer on the scene, tried to get to Maida by breaking the glass with a sledgehammer but was unsuccessful. Fire and rescue eventually came and gained entry to the enclosed area by ripping tiles and insulation out of the ceiling. Maida was pronounced dead at the scene. T10:531-543.

The medical examiner, Aurelian Nicolaescu, testified the bullet entered Maida's chest, went through his heart and right lung, and lodged in his back. The wound would have caused rapid, massive blood loss, leading to loss of consciousness and death within a minute or so. T12:809-810, 815-816, 819-820.

Detective Leavens, the lead detective, testified the cashier's area was enclosed with bulletproof glass. T10:586. The switch to the right of the cashier's counter, which locks the front door magnetically, was in the "on" position, securing the door. Each time the front door opened, a chiming sound alerted the people inside that someone had entered the store. T10:578. Leavens testified as the video was shown to the jury that Maida appeared to activate the lock switch, then lock himself in the cashier's booth. The robber saw what Maida was doing and ran back towards the cashier's door. A shot was fired, and then the robber squatted down, stood back up, and shot again. T10:553-570.

Crime scene detectives arrived after fire and rescue had left, part of the bulletproof glass had already been removed,

and the scene was secured. T10:595. The right front door had smashed glass. The burglar bars had been dislodged but were still attached. T11:606. On the sidewalk outside the store was a portable phone, pieces of a phone or recorder, a battery, and currency. A piece of the locking mechanism to the front door was gone, and damage to the front door frame looked like the result of a bullet trajectory. T11:606-609, 619-621. Inside the store was scattered currency, paper and coins, broken glass, a white plastic bag with currency, five 9 millimeter shell casings and three bullet fragments. T10:598, T11:661, 669, 721-722, 729. The interior front entry had two bullet holes, with a bullet lodged in one of the holes. T11:646-657. The bullet fragments were recovered from the interior front door, just outside the cashier's door, and in the pile of broken glass at the front door. T11:656-657, 723. In the cashier's door were two bullet holes, one above the handle of the door and another in the glass portion of the door. The bullet hole in the door frame was 3'10" from the floor and 1-1/2 inches from the left door frame. The bullet hole in the glass was 4'5" from the floor. T11:657-660. The cashier's area was encased with "very thick" bulletproof glass from counter to ceiling, as was the cashier's door. T11:671, 710.

The detectives recovered DNA from blood on the floor, the interior door handle, a five-dollar bill, and the white plastic

bag. T11:679-689. A palm print and thumb print were recovered from the plastic bag. T12:846.

Officer McClain took over the case in June 2009. In February 2010, McClain obtained a warrant to compare Yacob's DNA with the DNA at the scene, and Yacob was arrested. At the time of his arrest, Yacob was 5'4", 130 pounds, a height consistent with the person who committed the robbery, based on a marker tape at the store's front door. T12:827-831. The DNA from the crime scene matched Yacob, T12:875, 884, 895, as did the palm and thumb prints on the plastic bag. T12:840-842.

Penalty Phase

On October 13, 2011, at a pre-penalty phase hearing, defense counsel sought to admit at the penalty phase videotaped statements from three mitigation witnesses, "to be treated just like any other letter someone wrote that couldn't attend the hearing."[6] R6:1061. Defense counsel stated that the witnesses lived in Seattle and it would not be "cost effective to pay for the flight all the way out there." R6:1061. One witness, Sosna Beyenne,[7] was present, but Yacob did not wish to call her. The other two witnesses were former high school teachers. R6:1061-

[6] The videotape contains statements from five mitigation witnesses. It's unclear why defense counsel mentioned only three of them at this proceeding.

[7] Although defense counsel initially identified Ms. Bayenne as Yacob's grandmother, Yacob clarified to the court that she is his mother. R6:1063, 1071.

1068. The trial court denied the request without viewing the video on the grounds that the state would be deprived of an opportunity to cross-examine the witnesses. R6:1068.

Defense counsel then informed the trial judge that Yacob did not want to call any of his family members as witnesses and had instructed his counsel not to present any mitigation testimony other than the testimony of David Douglas, the defense investigator. R6:1073. The trial judge questioned Yacob, and Yacob stated he was aware that the defense had notified the prosecutor of eight potential witnesses for the penalty phase and who those witnesses were: Mulugetta Jacob, Susan Braithwaiter, Sosna Beyenne, Asmerit Beker, Candace Burnikel, Barbara Cochrane, Love Denton, and David Douglas. Defense counsel summarized the substance of the witnesses' testimony. Mr. Jacob, Yacob's father, would testify to his son's upbringing, his relationship with his son, what his son had been through when he immigrated to this country, and his love for his son. Ms. Braithwaiter, Yacob's stepmother, would testify to part of Yacob's upbringing and how much he means to her and his siblings. Sosna Beyenne, Yacob's mother, would testify to his upbringing when he was with her, and Asmerit Beker, Yacob's paternal grandmother, would testify to his upbringing in Eritrea and Ethiopia. Mr. Denton, Ms. Cochrane, and Ms. Burnikel, all educators, would testify to the difficulties Yacob had to

overcome in high school and how he focused and overcame those difficulties. Mr. Douglas would discuss Yacob's upbringing, some of the difficulties he had gone through, his immigration, and his parents' separation. R6:1074-1087. Asked when he decided not to present mitigating testimony other than Mr. Douglas's testimony, Yacob said he had been thinking about it every day for the past seventeen months and had made the decision after the jury found him guilty. Asked why he made the decision, Yacob said it was "too much pain for my family. . . Having them come and take the stand and talk about their son and brother's life, it would be too much pain for them, sir." R6:1091-1092. Asked if he had talked about the decision with his lawyers, and if his lawyers had discussed with him the evidence they could present on his behalf, Yacob said, yes. Asked if his decision would change if the court ruled the investigator could testify only to matters within his personal knowledge, Yacob said, no. R6:1093-1095.

At a hearing on October 17, the court again asked Yacob if it was his wish that no mitigation witnesses other than Mr. Douglas testify. Yacob responded that was still his wish. R6:1146-1147.

On October 18, the penalty phase before the jury was held. Prior to testimony, Yacob confirmed that he still did not wish to call any mitigation witnesses other than David Douglas.

T14:1172-1173. The trial court summarized the possible mitigating evidence: the difficulties Yacob had to overcome in his education, transitioning to the United States, the love between him and his family, he had been a good big brother, he had been an obedient son, he was torn between two parents, he was abandoned by his father at a critical time in his development, he was raised in a third-world country, he was a diligent student, he helped with difficult chores such as carrying water, his family members love him and he loves them. T14:1175-1176. Yacob again said he made the decision because it would be "too hard on my family, too much pain." T14:1177.

The trial court ruled Douglas's testimony was limited to Yacob's age, the various places Yacob had lived, that he graduated from high school, and that his mother had religious icons and paintings in her home in Seattle. T14:1203-1206.

The state presented the victim impact testimony of Christen and Georgi Maida, Moussa Miada's sisters, and Samar Safar, Maida's mother, along with thirteen photographs of Maida with his family members. T14:1260-1281.

David Douglas, the defense investigator, testified that Yacob was born in Eritrea, East Africa, on July 5, 1985. In 1987, he moved to Ethiopia. In May 1998, Yacob immigrated to the United States to East Orange, New Jersey, where he lived until the summer of 2001. Yacob then moved to Seattle,

Washington, where he lived until he graduated high school in 2003. After graduating high school, he moved to Jacksonville, Florida, to live with his father. Douglas testified that Yacob appeared to love his family and they him. The defense introduced photographs of Yacob with members of his family, including his mother, father, grandmother, aunt and uncle, and younger brother. T14:1284-1292.

The jury recommended that Yacob be sentenced to death by a vote of 10 to 2. R4:691, T15:1377.

Spencer Hearing

A Spencer hearing was held on November 18, 2011. The trial court admitted into evidence the videotape of the Seattle mitigation witnesses. T15:1389-1391; Defendant's Exhibit A. The state did not object, stating, "At this state, I have no objection because I believe, quite frankly, that almost anything can come in." T15:1390. The judge asked Yacob if he was prohibiting his lawyers from presenting his family members to testify, and Yacob said, yes, "[i]t's just too much pain for them, sir." T15:1394. The judge told Yacob the videotape had been entered into evidence and he would watch it in great detail. T15:1395. The judge stated he had ordered and received a comprehensive presentence investigation report (PSI) from the Florida Department of Corrections, dated November 14, 2011. T15:1395-1396.

The prosecutor stated that he had watched the video and made arguments “just for the record” to support his objection to admitting the videotape before the jury. T15:1399. The state argued that Yacob’s mother was holding and feeding a baby and was crying at times, which would be “extremely prejudicial.” The prosecutor also stated he would have cross-examined the teachers as to their knowledge of why Yacob was in the alternative school, including Yacob’s involvement in a schoolyard fight in October 2001 in which Yacob hit one student and attempted to hit another with a metal bar, which resulted in Yacob being charged with third-degree assault. T15:1406. The state noted that Yacob, in a statement to police, had admitted hitting the other student with a metal bar and said what he had done was wrong and that he respected what they had done. The trial judge admitted the judgment and sentence as relevant to rebut Yacob’s mother’s statement that her son was a good child. T15:1411.

In his deposition, David Douglas, the defense investigator, stated that he interviewed Yacob’s father, Mugaletta Jacob, several times and spoke to him on the phone on numerous occasions. R5:819, 843. He also interviewed Yacob’s stepmother, Susan Braithwaiter, and brother. R5:849. Mr. Jacob confirmed Yacob’s history of his life. Mr. Jacob was absent from Yacob’s life for eleven years. Eritrea and Ethiopia were

engaged in a civil war, and Mr. Jacob moved to Kenya, and then to the United States in the early 90's, to East Orange, New Jersey. Mr. Jacob left Africa primarily for work-related reasons. Michael, his mother, Sosna Beyenne, and his paternal grandmother, Asmerit Beker, remained in Africa. R5:820-822, 843. Eventually, Mr. Jacob brought Yacob and his mother to the United States. They soon separated, as Mr. Jacob had established a relationship with Ms. Braithwaiter, R5:844, 847, and eventually divorced. R5:847. Mr. Jacob admitted that he abused his son. R5:844. Douglas obtained the New Jersey Division of Youth Services records, which indicated the father had a physical altercation with his son when Michael was 13 or 14, was arrested and prosecuted, and Yacob was removed from the home and lived in a number of foster care settings. R5:846.

Douglas spoke to Ms. Bayenne by telephone at length and also interviewed her in Seattle. R5:829. Ms. Bayenne told Douglas she lived with her husband's family in Eritrea and then Addis Ababa, Ethiopia. R5:830. When she and Michael came to the United States, she was unhappy with the situation that she found in New Jersey and separated from her husband. R5:847. Michael stayed with his father, was in foster care for a year, and then moved to Seattle for his high school years. In Seattle, Michael was not allowed to have friends in the house, which was a bone of contention between her and Michael. R5:851.

Douglas obtained Yacob's school records from New Jersey and Seattle. R5:831. The records showed one arrest for hitting someone with a metal bar. Yacob's mother said Yacob was defending an Eritrean boy, that Seattle was home to a large Eritrean/Ethiopian population, and there was an ongoing dispute between the Asians and Eritreans. Yacob pled to third-degree aggravated assault and was placed on probation. R5:832-835. After this incident, Yacob went to an alternative high school, where he had to earn his way back to regular school. The officials at the alternative school were aware of the incident from some notes in the file and from what Yacob had told them. R5:833. Yacob completed the program at the alternative school, and then went to a different high school from which he graduated. R5:839.

After graduation, Yacob went to live with his father in Jacksonville. He and his father worked at the same convenience store. R5:835-836, 850.

Sosna Bayenne, Yacob's mother, said her husband left for Ethiopia two months after they married. She lived with her husband's family in Eritrea, and then, Addis Ababa. She lived with her husband for five months in New Jersey and then moved to Seattle. Michael was raised religious, Orthodox Christian. He went to mass every day. He did well in school. After he graduated from high school, she agreed to support him if he

continued his education, but told him if he decided to work, she would send him to his father, so his father could watch him. Michael wanted to work, so he went to live with his father in Jacksonville. Regarding the fight at school for which Michael was arrested, Ms. Bayenne said Michael told her it was five against one, that he couldn't just stand there and watch, and that he thought they were going to kill the boy. She said her son was nice, respected people, always respected her, never answered back, and never gave her any problems. Michael worked at home, did the laundry, washed the cars, cleaned, did everything. The neighbors loved him very much. When they moved to the United States, he was 13, and it was very hard to adjust to everything. He asked her if there was a God in this country. He wanted to go back. He didn't have many friends here. She was always told that he was a good student, there were never any problems. She felt if she had stayed in his life, things would be different. Defense Exhibit 1.

Asmerit Beker is Yacob's paternal grandmother. She has known him since birth and lived with him until he was 13. She nursed him as a baby. They lived in Eritrea for two months after his birth. He was a good boy, very helpful, and she loved him so much. He helped her at home. Anything she asked of him, he did. He cleaned the house, swept, got water. Ms. Beker's own children never helped her like that. Asked if Michael was

special to her, she said, “he’s my right eye.” Defendant’s Exhibit 1.

Barbara Cochrane was Yacob’s teacher at Southlake High. She has taught for 42 years. Yacob was in her Algebra class. He struggled with math but was determined. He didn’t want to give up. He was not confident in math but would ask for help. He was an independent worker. He was pleasant in class and did not cause any conflicts. He was serious about school, extremely determined. He struggled and worked until he got it right. Defendant’s Exhibit 1.

Love Denton is the Assistant Principal at Southlake High. Denton supervises students who come there for re-entry. In order to return to regular high school, students must attend 95% of their classes, complete 95% of the assigned work, and cannot be involved in the activity that got them there. Yacob completed the process and was able to return to the regular high school setting. Defendant’s Exhibit 1.

Candace Burnikel was Yacob’s teacher in the Behavior Modification/Personal Choice class for three terms. The class included conflict resolution, goal setting, self-esteem, etc. Ms. Burnikel remembered Yacob positively. He wanted to do the right thing. He started with a C in the class, than got A’s. He was the only student to receive an A the third term. She never had a problem with him, and he was always respectful. He

kept to himself. He was kind and helpful, not someone you would expect to see getting into further trouble. He sought after adult counsel to find solutions to issues. Ms. Burnikel said she had worked with kids with severe behavioral issues, had been a corrections officer, and had years of experience in counseling. This was heartbreaking. Yacob was not someone she would have perceived as being in the situation he was in. Defendant's Exhibit 1.

The PSI noted that Yacob was last employed as a cashier at a convenience store in Jacksonville and reportedly had previous employment with BP Gas Mart, Snappy Foodmart, EZ Pick Foodmart, Talleyrand Foodmart, and Super Foodmart. This information was verified by Yacob's father, Mulugetta Jacob.

The PSI further stated that Yacob's grandmother is 70 years old, his father is 45 years old, his mother is 39 years old, his stepmother is 42, and his stepbrother and stepsister are 19 and 15, respectively. Under "Family History," the report stated (as verified by Mr. Jacob) that Yacob was born in Asmara, Eritrea, on July 5, 1985. He was the only child of an arranged marriage, and they never lived together as a family. Yacob's father left before Yacob was born to seek work in Addis Ababa, Ethiopia. When Yacob was about 2 years old, he and his mother moved to Addis Ababa to live with his paternal grandmother due to the emerging civil war between Eritrea and Ethiopia. His father had

already been interned in Kenya due to the war. Yacob lived in Addis Ababa with his mother until he was 12 or 13, when his father sponsored him and his mother to come to the United States. They joined him in New Jersey and began living together as part of an extended family, along with his father's new family. Within a year, his mother moved to Seattle because of the internal family conflict. Yacob remained with his father in New Jersey until unspecified problems caused him to be sent to live with his mother in Seattle at age 16. At age 14, social services intervened after Yacob's father struck Yacob in the face, and Yacob was removed from his father's custody and held in foster homes for a year. Yacob said this was not considered abuse in his native country.

The PSI further stated that as a result of its review, "it appears that the defendant's lack of education and family history were found to be contributing factors in the defendant's decision to commit these crimes."

Sentencing Order

The trial judge found one aggravating circumstance, robbery merged with pecuniary gain, which he gave great weight.

In mitigation, the trial court found age of 22 (no weight); Yacob emigrated from a foreign country (slight weight); Yacob is intelligent and graduated from high school (slight weight);

Yacob did not harm anyone else in the store (little weight); Yacob loves his family and his family loves him (slight weight).

The trial court concluded the defense had failed to establish any mitigation through the evidence admitted at the Spencer hearing "for the same reasons the Court ruled such evidence inadmissible during the penalty phase: the statements contained therein constitute rank hearsay in violation of the Confrontation Clause." R5:913. The trial court thus rejected as not established the following proposed mitigating circumstances: (1) Yacob was a diligent student who overcame academic challenges; (2) Yacob is a hard worker; (3) Yacob was raised in a religious home and has faith in God; (4) Yacob was abandoned by his father in a critical time of his development, was torn between two parents, and was abused by his father; (5) Yacob didn't have friends growing up; (6) Yacob came to the defense of a boy being bullied; (7) Yacob is a respectful and obedient person.

The trial court further stated that it found the PSI "unremarkable" and concluded that none of Yacob's life challenges would constitute "significant" mitigation. R5:927. In a footnote, the court stated that the PSI reflected that Yacob attended a certification program for Massage Therapy, but dropped out to work, and had worked at several convenience stores, that Yacob reported his mental health was fair, in that

he suffered from depression, and that he admitted occasional alcohol and marijuana use but denied alcohol or drug abuse. R5:927 n.19.

In a summary of facts, the trial judge addressed the state's argument that it could reasonably be inferred from the video that Yacob realized Maida was either pressing the alarm button or locking the front door. The court agreed "this inference is not unreasonable based on the video footage," noting there was other evidence in the record to support this inference, i.e., that Yacob had worked in convenience stores. The court also stated that "what the Defendant knew" when he shot Maida "is an operation of his mind" and "difficult to determine from the evidence." The court then concluded that even if Yacob had realized Maida was pressing the alarm and/or locking the front door, this would not change the analysis "because shooting Mr. Maida had no hope of effectuating the Defendant's exit . . . [and] [u]nder either scenario, the shooting was both vengeful and gratuitous." R5:907 n.7.

In sentencing Yacob to death, the trial court distinguished this case from comparable cases in which this Court vacated the death sentence because of the presence of substantial mitigation in some of the cases and the "the level of uncertainty" in other cases in terms of the defendant's intent and whether the murders were in response to resistance by the victim. R5:927-931. The

trial court concluded there was little or no mitigation here, "due to a voluntary choice made by the Defendant," R5:928, and there was no uncertainty as the videotape showed that Maida never offered any "physical resistance" to the robbery. R5:932. The trial court concluded Yacob's decision not only was premeditated, but Yacob "simply carried out what he had planned from the moment he chose not to cover his trigger finger with a glove, an execution meant not to prevent an actual threat, but to avoid any possible threat." The court concluded this was not a "robbery gone bad" but that Yacob's actions were those of a "murderer who . . . happened to be committing an armed robbery." R5:932.

SUMMARY OF ARGUMENT

Issue 1. The trial judge violated this Court's directive in Farr v. State, 621 So. 2d 1368 (Fla. 1993) by sentencing Yacob to death without considering all possible mitigating evidence in the record. The sentencer may not refuse to consider as a mitigating factor any aspect of the defendant's character or record and any aspect of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. The constitutional requirement that mitigating evidence be considered and weighed when contained anywhere in the record applies with no less force when a defendant waives

the presentation of mitigating evidence. Here, the trial judge did not consider or weigh the mitigating evidence admitted into evidence at the Spencer hearing, which included videotaped statements of five witnesses and the deposition testimony of a sixth witness, solely on the grounds that the evidence was hearsay. Hearsay is admissible in the penalty phase of a capital trial, and the state had an opportunity to rebut this evidence, and did so. In addition, this Court's directive in Farr and its progeny clearly contemplates the consideration of hearsay evidence, such as that contained in the PSI. The trial judge also failed to consider and weigh all possible mitigation contained in the PSI. The mitigation evidence presented at the Spencer hearing and in the PSI was believable and uncontroverted, and the trial court erred in rejecting this evidence wholesale. A new penalty phase proceeding is required.

Issue 2. The death sentence is disproportionate for this robbery-murder. As this Court has stated time and again, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders. Accordingly, this Court has upheld single-aggravator cases only where the aggravator is especially weighty or there is very little or nothing in mitigation. This is not such a case.

This was an unplanned, reactive shooting during a convenience store robbery, in response to the clerk's attempt to

lock appellant in the store. The sole aggravating circumstance, committed during a robbery, is not especially weighty, and the record contains evidence of numerous mitigating circumstances, including that Yacob was raised in a third-world country, had difficulty adjusting to the United States after he came here at the age of 13, was abandoned by his father during a critical time of his development, was torn between two parents, was abused by his father and spent a year in various foster care shelters, was a diligent student and overcame educational deficits to obtain a high school diploma, and is a hard worker. This is neither the most aggravated, nor the least mitigated of capital murders. When compared to similar cases, it is clear that equally culpable defendants have received sentences of life imprisonment. This Court should reverse Yacob's death sentence and remand for imposition of a life sentence.

Issue 3. Florida's death penalty statute is unconstitutional under the sixth amendment pursuant to Ring v. Arizona.

ARGUMENT

ISSUE 1

THE TRIAL JUDGE ERRED IN SENTENCING YACOB TO DEATH WITHOUT CONSIDERING VALID MITIGATION IN VIOLATION OF THIS COURT'S DECISION IN FARR.

Mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. Robinson v. State, 684 So. 2d 175, 177 (Fla. 1996). This requirement applies with equal force when a defendant argues against the death penalty or, as here, waives the presentation of mitigating evidence. Farr v. State, 621 So. 2d 1368 (Fla. 1993).

Because of the inherent tension between a defendant's right to waive presentation of mitigating evidence[8] and the trial court's obligation to consider all such evidence,[9] this Court has

[8] This Court repeatedly has recognized a competent defendant's right to waive presentation of mitigating evidence. Spann v. State, 857 So. 2d 845 (Fla. 2003; Durocher v. State, 604 So. 2d 810 (Fla. 1992); Pettit v. State, 591 So. 2d 618 (Fla.), cert. denied, 506 U.S. 836 (1992); Hamblen v. State, 527 So. 2d 800 (Fla. 1988).

[9] This Court has characterized this tension as "the friction between an individual's right to control his destiny and society's duty to see that executions do not become a vehicle by which a person could commit suicide." Hamblen v. State, 527 So. 2d 800 (Fla. 1988). The Court there held that a competent defendant's right to control his or her own destiny "does not mean that courts can administer the death penalty by default" or that the "rights, responsibilities, and procedures set forth in our constitution and statutes have [] been suspended." Id. at 804. Accordingly, "a defendant cannot be executed unless his

established procedures to preserve both the defendant's right and the trial court's obligation.

First, where a defendant waives the presentation of mitigating evidence, defense counsel and the trial court must comply with the procedure set forth in Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993):

> [1][C]ounsel must inform the court on the record of the defendant's decision. [2] Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. [3] The trial court should then require the defendant to confirm on the record his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Second, the trial judge nonetheless "must carefully analyze all the possible statutory and nonstatutory mitigating factors against the established aggravators to ensure that death is appropriate." Robinson, 684 So. 2d at 177 (emphasis added); see also Farr, 684 So. 2d at 177; Pettit v. State, 591 So. 2d 618, 620 (Fla.), cert. denied, 506 U.S. 836 (1992).

Third, the trial court is required to order the preparation of a PSI where the defendant waives mitigation. Muhammad v. State, 782 So. 2d 343 (Fla. 2001). The PSI, "to be meaningful," should include information such information as previous mental

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guilt and the propriety of his sentence have been established according to law." Id.

health problems, school records, and relevant family background. Id. at 363.

This Court has vacated the death penalty and remanded for new penalty phase proceedings in several cases where the trial court failed to consider all possible mitigation in the record.

In Farr, the defendant pled guilty and waived his right to a penalty phase jury. At the time of sentencing, the record contained a psychiatric report and presentence investigation report that contained information about Farr's troubled childhood, his mother's murder, and other potential mitigation. In imposing the death sentence, the judge considered only Farr's apparent intoxication at the time of the murder and ignored mitigating evidence contained in the PSI and the psychiatric report. This Court held the trial court's failure to consider all of the available mitigating evidence was reversible error:

> . . . Farr argues that the trial court was required to consider evidence of mitigation in the record, including the psychiatric evaluation and the presentence investigation. Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence.

621 So. 2d 1369.

The Court reached the same result in Robinson. Robinson also pled guilty and waived his right to a penalty phase jury. At the penalty phase, the defense proffered mitigation evidence that it had received from a psychologist and the defendant's mother. The trial judge also ordered a PSI, which was subsequently submitted. In sentencing the defendant to death, the judge listed the possible mitigation, including that the defendant was in an extreme emotional state at the time of the offense, cocaine addiction, had lost his job, good jail record, cooperated with detectives, mental defects, and remorse. 684 So. 2d at 178. In its order, the judge discussed some of the mitigation but stated that he "had not considered the mitigators." In the next paragraph, the court stated that the aggravating circumstances "outweigh[ed] any potential mitigating circumstances." This Court held that the trial court's open admission that it had not considered the mitigators violated Farr. The Court further noted that the trial court failed to indicate how much weight it afforded any mitigation and summarily dismissed other possible mitigators, despite record evidence of some of those mitigators, including evidence in the PSI. Noting that the PSI and clinical evaluations disclosed evidence of mitigation that received little or no discussion in the sentencing order, the Court concluded that the trial court had failed to consider all of the available mitigating evidence

in the record as required by Farr and vacated the death sentence. 684 So. 2d at 179-180.

In other cases, the Court concluded that the trial court fulfilled its obligation to consider all possible mitigation evidence. In Pettit, for example, where the defendant waived the presentation of mitigating evidence, the Court stated:

> The trial judge performed this task in this case. He was particularly concerned with the effect of Pettit's having a condition known as Huntington's chorea. He required Pettit's examination by physicians and required their testimony in reference to the voluntariness of Pettit's guilty plea and for the presence of mitigating circumstances. He received the testimony of Pettit's grandfather in reference to the devastating and progressively deteriorating effect that Huntington's chorea has on a person. The trial judge also received a presentence investigation report.

591 So. 2d at 620. The Court concluded that by his treatment of Pettit's physical condition and by allowing the testimony of the grandfather, the judge fully understood the requirement of considering, and did consider, all possible mitigating evidence.

The defendant in Durocher also waived participation in the penalty phases. Durocher's counsel told the court that, if given the opportunity, he would have presented testimony about Durocher's life and family and testimony from the mental health experts who had examined Durocher. This Court held the trial judge had conscientiously performed his duty by carefully considering and weighing "all of the evidence about Durocher

that could be gleaned from his statements, from the reports of the mental health experts who examined Durocher prior to trial and prior to his change of plea, and from counsel's statement in court." 604 So. 2d at 810.

In the present case, the trial court complied with Koon[10] but erred by not considering valid mitigation in violation of Farr.

At the Spencer hearing, the trial court admitted into evidence the videotape excluded at the penalty phase before the jury, which contained statements by Yacob's mother, grandmother, two former teachers, and the assistant principal at Yacob's former high school in Seattle, Washington. The prosecutor did not object, stating, "At this stage, I have no objection because I believe, quite frankly, that almost anything can come in, but I will address and respond to that once it's in evidence." 15:1390. The judge informed Yacob that he would watch the video in "great detail." The trial judge also admitted into evidence, without objection, the deposition of David Douglas, the defense investigator, whose testimony during the penalty phase had been limited to matters within his personal knowledge. The trial judge also received a PSI report dated November 14, 2011.

[10] The trial judge complied with Koon by making the appropriate inquiry on numerous occasions, at two pre-penalty phase hearings, at the penalty phase, and at the Spencer hearing.

Despite admitting this mitigating evidence, the trial judge did not consider or weigh most of it on the grounds that it was hearsay. The possible mitigating evidence the judge failed to consider included, as summarized by the trial judge, the difficulties Yacob had to overcome in his education and in transitioning to the United States; he had been a good big brother; he had been an obedient son; he was torn between two parents; he was abandoned by his father at a critical time in his development; he was raised in a third-world country; he was a diligent student; he helped with difficult chores such as carrying water. The record also contains evidence that Yacob was abused by his father at age 13 or 14, was removed from his father's custody, and lived in several different shelters for a year. This mitigation was established through the testimony of Yacob's mother, grandmother, his former high school teachers, Ms. Cochrane and Ms. Burnikel, his former high school assistant principal, Love Denton, David Douglas, and the PSI.

The trial court erred in failing to consider and evaluate this evidence based solely on its "hearsay nature."

First, hearsay is admissible in the penalty phase. Section 921.141(1), Florida Statutes (2008), "provides 'wide latitude . . . in admitting penalty-phase evidence.'" Marak v. State, 14 So. 3d 985, 996 (Fla. 2009)(quoting Rutherford v. State, 727 So.

2d 216, 221 (Fla. 1998). Specifically, it provides that, during the penalty phase of a capital trial,

> Evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

s. 921.141(1), Fla. Stat. (2009).

Here, the trial judge properly admitted the videotape and deposition, without objection from the state. Even the state recognized that "[a]t this stage, . . . almost anything can come in." T15:1390. The state had an opportunity to rebut anything in the videotape and did so. The state's only concern with the videotaped statement was whether the teachers had knowledge of the incident that resulted in Yacob's being at the alternative school. David Douglas testified in his deposition that the teachers were aware of the incident. The state also sought to rebut Yacob's mother's testimony that Yacob was a good child with evidence of a school fight Yacob was involved in when he was 16 years old. The trial judge admitted the judgment and sentence of two counts of third-degree aggravated assault that resulted from that incident.

Second, this Court has made clear in Farr and its progeny that when a defendant waives the presentation of mitigating evidence, the trial judge nonetheless must consider any possible mitigation in the record. "It is clearly the responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed and it is error to fail to do so." Id. at 179. This includes hearsay, such as that contained in the PSI, which the trial court is required to order and consider when a defendant waives the presentation of mitigating evidence. See Muhammad.

Third, if the trial judge has questions about the credibility of the mitigation witnesses or the information contained in the PSI, the trial judge has a number of ways to address those issues. As outlined in Muhammad, the trial court has the discretion to call persons with mitigating evidence as its own witnesses, as the trial courts did in Pettit and Spann v. State, 857 So. 2d 845 (Fla. 2003). If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court has discretion to appoint special counsel to present the mitigation as was done in Klokoc v. State, 589 So. 2d 219 (Fla. 1991), or to utilize standby counsel for this limited purpose. See Muhammad, 782 So. 2d at 364.

In Farr and Robinson, this Court reversed the death sentence because the trial court failed to consider and weigh

mitigating evidence in the record, some of which was hearsay. And in Pettit, Spann, and Durocher, this Court found no error because the trial judges in those cases had considered all possible mitigation that could be gleaned from the record, including hearsay.

Here, the trial court conscientiously fulfilled its obligation under Koon to ensure that Yacob's waiver of the presentation of mitigating evidence was knowing and voluntary. The trial judge failed to fulfill its obligation under Farr, however, by not considering all possible mitigators, despite record evidence of those mitigators. As this Court said in Muhammad, the purpose of the Court's requirements is to "ensure reliability, fairness, and uniformity in the imposition of the death penalty in those rare cases where the defendant waives mitigation." 782 So. 2d at 363. That requirement of fairness and reliability has been called into question here.

Accordingly, this Court must reverse Yacob's death sentence and remand for a new penalty proceeding.

ISSUE 2

THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR ONE-AGGRAVATOR CASES.

This was an unplanned, reactive shooting during a convenience store robbery, in response to the clerk's attempt to lock appellant in the store. The sole aggravating circumstance, committed during a robbery, is not especially weighty, and the record contains evidence of numerous mitigating circumstances. This Court has vacated the death sentence in similar robbery-murder cases involving only one aggravator, as well as in robbery-murders more aggravated than the present case. When compared to similar cases, it is clear that equally culpable defendants have received sentences of life imprisonment. Accordingly, Yacob's death sentence is not proportionately warranted.

The purpose of this Court's proportionality review "is to foster uniformity in death-penalty law" and to prevent the imposition of "unusual" punishments.[11] As this Court explained in Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991), "[i]t clearly is 'unusual' to impose death based on facts similar to those in cases in which the death penalty previously was deemed improper." Thus, in deciding whether the death penalty is

[11] The requirement that death be administered proportionately rests in part on the prohibition against unusual punishments in Article 1, section 17, of the Florida Constitution. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

unusual in this sense, "'[w]e compare the case under review with all past capital cases.'" Williams v. State, 437 So. 2d 133, 137 (Fla. 1983)(quoting Brown v. Wainwright, 392 So. 2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981)); Urbin v. State, So. 2d 411, 416-17 (Fla. 1998).

In making this comparison, the Court considers several factors:

> Our proportionality review requires us "to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). In reaching this decision, we are also mindful that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Consequently, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.; Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993).

Terry v. State, 668 So. 2d 954, 965 (Fla. 1996); see also Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998)("[t]he people of Florida have designated the death penalty as an appropriate sanction for certain crimes, and in order to ensure its continued viability under our state and federal constitutions 'the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of [the] most serious crimes'")(footnote omitted).

Application of these considerations mandates a reduction of Michael Yacob's death sentence to life imprisonment.

First, this is not one of the most aggravated of first-degree murders. There is but one aggravating circumstance,[12] and that aggravating circumstance, committed during a robbery, is not especially weighty.[13]

This Court repeatedly has stated that it will not ordinarily uphold a sentence of death based on a single aggravating circumstance, unless there is little or no evidence of mitigation. See Jones v. State, 705 So. 2d 1364, 1365 (Fla. 1998)("while this Court has on occasion affirmed a single-aggravator death sentence, it has done so only where there was little or nothing in mitigation"); see also DeAngelo v. State, 616 So. 2d 440 (Fla. 1993)(same); McKinney v. State, 579 So. 2d

[12] The trial court properly found that the aggravating circumstance of pecuniary gain merged with the robbery aggravator, as they address a single aspect of the crime.

[13] This Court has deemed the heinous, atrocious, and cruel (HAC) and cold, calculated, and premeditated (CCP) aggravating circumstances two of the "most serious aggravators set out in the statutory scheme," whose absence, while not controlling, is not without relevance to proportionality analysis. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). This Court has also said the prior violent felony aggravator is one of the "most weighty in Florida's sentencing calculus." Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002).

80, 85 (Fla. 1991)(same); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990)(same).[14]

This Court has vacated the death sentence in similar robbery-murder cases, where the sole aggravator, as here, was committed during a robbery. See Williams v. State, 707 So. 2d 683 (Fla. 1998)(reversing death penalty in shooting death of man outside his home where pecuniary gain was weighed against age of 18 and nonstatutory aggravating factors); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995)(reversing death sentence for shooting death of cab driver where pecuniary gain/robbery was weighed against three nonstatutory mitigators given little to no weight

[14] The Court has on occasion affirmed single-aggravator death sentences where the lone aggravator was especially weighty. E.g., Rodgers v. State, 948 So. 2d 655 (Fla. 2006)(defendant shot wife in the back and in the head, and lone aggravator was prior violent felony based on a 1963 robbery conviction and a 1979 manslaughter conviction, stemming from killing girlfriend); cert. denied, 552 U.S. 833 (2007); Butler v. State, 842 So. 2d 817, 833 (Fla. 2003)(lone aggravator was HAC, where defendant sneaked into former girlfriend's apartment as she slept, carried their six-year-old child into another room, and repeatedly stabbed her mother until she died); Blackwood v. State, 777 So. 2d 399 (Fla. 2000)(lone aggravator was HAC, where defendant strangled victim manually and with wire, smothered her with a pillow, ripped hair from her scalp, and inflicted bruises on her head, neck and body); Ferrell v. State, 680 So. 2d 390 (Fla. 1996)(lone aggravator was prior second-degree murder bearing many earmarks of present crime); Duncan v. State, 619 So. 2d 279 (Fla.)(single aggravator was prior second-degree murder of fellow inmate), cert. denied, 510 U.S. 969 (1993); King v. State, 436 So. 2d 50 (Fla. 1983)(death penalty affirmed for shooting of live-in girlfriend where prior conviction was for axe-slaying of common-law wife).

and this Court's finding of Sinclair's low intelligence and emotional disturbance); Thompson v. State, 647 So. 2d 824 (Fla. 1994)(reversing death sentence for shooting death of fast-food worker where commission during robbery was sole aggravating circumstance, weighed against several nonstatutory mitigating circumstances); Lloyd v. State, 524 So. 2d 396 (Fla. 1988) (reversing death sentence for shooting death of 28-year-old woman in her, where commission during robbery was sole aggravator, weighed against one mitigating circumstance, no significant history of prior criminal activity); Caruthers v. State, 465 So. 2d 496 (Fla. 1985)(reversing death sentence for shooting death of convenience store clerk where sole aggravator, commission during a robbery, was weighed against no history of prior criminal activity, confession and guilty plea, mutual love and affection for family, remorse, and encouragement of younger brother to do well and avoid violating law); Rembert v. State, 445 So. 2d 337 (Fla. 1984)(reversing death sentence for clubbing death of elderly clerk at tackle shop, where there was no mitigation).

This Court also has vacated the death sentence in similar robbery-murders, where two valid aggravators were weighed against mitigation comparable to that here. See Scott v. State, 66 So. 3d 923 (Fla. 2011); Johnson v. State, 720 So. 2d 235 (Fla. 1998).

Second, contrary to the trial court's conclusion, the circumstances of this crime do not set it apart from other robbery murders which this Court has determined did not warrant the death penalty.

In sentencing Yacob to death, the trial court distinguished this case from comparable robbery-murder cases in which this Court vacated the death sentence based on the presence of substantial mitigation in some of the cases and, in other cases, on the "level of uncertainty," meaning uncertainty in terms of the defendant's intent and whether the murders were in response to resistance by the victim. R5:927-931. The trial judge concluded there was little or no mitigation here "due to the voluntary choice made by the defendant," R5:928, and there was no uncertainty about the defendant's intent because the videotape showed that Maida never offered any "physical resistance" to the robbery. R5:932. The trial judge further concluded that this was not a "robbery gone bad" but an "execution" and that Yacob planned to kill before he entered the store.

First, the trial court's conclusions as to Yacob's intent is not supported by the evidence. The trial judge acknowledged that Yacob had completed the robbery and was heading towards the front door when Maida hit the lock switch. The trial court further concluded that a reasonable inference to be drawn from

the video footage, along with Yacob's prior experience working at convenience stores,[15] is that Yacob realized Maida was pressing the alarm or locking the front door. The trial judge also acknowledged that "exactly what the Defendant knew" when he shot Maida "is an operation of his mind, and difficult to determine from the evidence before the Court." R5:907. Nonetheless, the trial court concluded that "because shooting Mr. Maida had no hope of effectuating the Defendant's exit," the shooting was "vengeful and gratuitous."

The trial judge's conclusion does not make logical sense. If Yacob was aware that Maida had locked him in the store, and killing Maida could not possibly help him get out of the store, why would Yacob decide to kill Maida? A far more reasonable inference to be drawn from the videotape is that Yacob suspected Maida had hit the switch and was attempting to get into the cashier's area himself, and when he was unable to get inside the enclosed area, shot the door in desperation either to shatter the glass or scare Maida into deactivating the lock switch.[16]

The trial court's conclusion that Yacob shot Maida "calmly and with chilling purpose," and panicked only after he could not

[15] The PSI states that Yacob worked as a cashier at the Dragon Foodmart on Emerson Street in Jacksonville, Florida, from May 2008 to November 2008, and that he previously had worked at other convenience stores, including BP Gas Mart, Snappy Food Mart, EZ Pick Foodmart, Talleyrand Foodmart, Super Foodmart

[16] This all occurred within a matter of seconds.

get out the front door, is not ascertainable from the video. In the videotapes from the two cameras that show the robbery and shooting, the shooting itself is obstructed either by the cashier's enclosure or by Maida. Moreover, Yacob was wearing a hood and a mask over his face. The most that can be ascertained from the video is that Yacob dropped or placed the money on the ground after the first shot, and that his gloved hand may have been under the gun when the second shot was fired. Due to the obstructions, it is difficult, if not impossible, to ascertain anything about Yacob's posture or demeanor when either shot was fired. There is no way to conclude whether panic set in when he saw Maida hit the lock switch or at some later point in time. Furthermore, that Yacob had both hands on the gun when he fired the second shot does not prove anything about his intent. Yacob had his gloved hand under the gun, probably to stabilize it, the entire time the robbery was taking place, and evidently had no intent to shoot Maida then. That Yacob may have had his gloved hand under the gun as he stood outside the cashier's enclosure is consistent with the reasonable inference that his intent was to scare Maida into deactivating the switch.

Last, the trial court completely ignored that Maida was standing behind what was believed to be bulletproof glass when he was shot and that Yacob was unaware that he had killed Maida. The trial court concluded these factors were not proper

mitigation because “this argument is intended to create lingering doubt of defendant’s guilt of First Degree Murder,” and that these factors were not relevant to the nature or circumstances of the crime. R5:918-919. This is not a “lingering doubt” argument, however, as Yacob did not argue below, nor does he argue here, that the evidence is insufficient to support the jury’s finding of first-degree felony murder. Furthermore, that the glass was thought to be bulletproof clearly is a relevant circumstance of the crime. Three detectives testified that the cashier’s area, from counter to ceiling, including the door, was encased in very thick, heavy bulletproof plexiglass. Given the appearance of the glass, that the cashier’s area was completely enclosed, and Yacob’s prior experience working as a cashier in convenience stores, including a Snappy Food Store, a reasonable inference to be drawn is that Yacob assumed the glass was bulletproof and that shooting at it would not produce the result that it did, just as Maida no doubt assumed he was safe within the enclosure. Maida did not fall immediately when struck, and it’s not clear whether Yacob knew the second bullet had penetrated the glass. After the second bullet was fired, Maida turned around, walked towards the other end of the enclosed area, then screamed twice. By the time Maida screamed, Yacob was close to the front door. Yacob then ran back to grab the bag of money, which was still sitting on

the floor in front of the cashier's door, fired another shot (it appears from the video that this shot was fired at the floor), and ran back to the front door. When he still couldn't get out the front door, Yacob yelled at Maida, "open the … door, open the … door."

These circumstances strongly suggest that Yacob did not intend to kill Maida or know that his actions would produce that result, and that he did not know he had killed Maida.

Imposition of the death sentence must be based on proof beyond a reasonable doubt, not speculation derived from equivocal evidence. Here, the trial judge's conclusions about Yacob's intent are not supported by the videotape or by any other evidence in the record. Rather, for the reasons discussed above, we don't know any more about Yacob's intent than that of the defendants in similar robbery-murder cases in which this Court reversed the death sentence.

In Thompson, for example, the defendant walked into a Subway sandwich shop, conversed with the clerk, who was making a sandwich behind the counter, then shot the clerk through the top of the head with a 9 mm pistol. A witness, who was eating a sandwich in her car outside the shop, saw Thompson enter the store and converse with the clerk. She looked down to take a bite of her sandwich, heard a "pop," looked up, and saw Thompson standing over the victim with the gun in his hand. The trial

judge found in mitigation that Thompson was a good parent and provider and had exhibited no violent propensities prior to the killing. Though discounting its mitigating value, the trial judge also found Thompson had received an honorable discharge from the Navy, had maintained gainful employment, was raised in the church, possessed rudimentary artistic skills, and had been a good prisoner. This Court vacated the death sentence, noting there was but one valid aggravator and "significant" mitigation.

In Sinclair, the defendant robbed and shot a cab driver. Although Sinclair claimed he fired the gun only once, and that it was an accident, the victim was shot twice in the head. The trial court found and gave little or no weight to the mitigating factors that Sinclair cooperated with police, had dull normal intelligence, and was raised without a father or father figure. This Court reversed the death sentence, based on these mitigators and its own assignment of substantial weight to Sinclair's low intelligence and emotional disturbance.

In Williams v. State, 707 So. 2d 683 (Fla. 1998), the defendant shot Bobby Burke eight times as Burke was taking out the garbage. A witness saw Williams confront and shoot Burke. Williams told several people that he only intended to rob Burke, but when Burke "bucked him" (resisted), he killed him. Burke was shot five times in the chest, once in the neck, once in the finger, and once in the back. The shot in the back was fired

from a distance of no further than ten inches and was consistent with Burke lying face down or being on all fours when shot. This Court reversed the death penalty where the sole aggravating factor, pecuniary gain, was weighed against the mitigating factors of age (18), good prisoner while awaiting trial, obtained G.E.D. while in jail, possibility of rehabilitation, religion, plans to get involved in prison ministry, and work capacity.

In Terry, the defendant shot Joelle Franco during a robbery of a Mobil Station in Daytona. Terry's co-defendant, who was masked, held Mr. Franco at gunpoint in the station's garage while Terry, who was not wearing a mask, went to rob Mrs. Franco. Mr. Franco heard a scream and thirty seconds later a shot. The trial court found two aggravating circumstances, committed during a robbery and prior violent felony based on the contemporaneous aggravated assault committed by Floyd. The trial court rejected Terry's nonstatutory mitigation of emotional and developmental deprivation in adolescence, poverty, and good family man. In addressing the proportionality of the death sentence, this Court stated that although there was evidence to support the theory that this was a "robbery gone bad," it could not determine on the record what transpired before the victim was shot. The Court concluded that although there wasn't much mitigation, the aggravation also was not

extensive, and compared to similar robbery-murders, the death penalty was not warranted.

In Johnson, the defendant was convicted of the first-degree murder of Willie Gaines, the attempted first-degree murder of Calvin "Big" Gaines, armed robbery, attempted armed robbery, and burglary with assault. Johnson's co-defendant and brother, Anthony, was convicted of robbery with a firearm and attempted murder of "Big" Gaines, Willie Gaines' son. Johnson shot Willie Gaines four times, three times in the chest, once in the right hand, and once in the jaw. A pal of Johnson's testified that Johnson claimed he shot the victim when he resisted the robbery. This Court upheld the defendant's conviction for first-degree murder under both premeditated and felony-murder theories, reasoning that "Calvin shot Willie multiple times in the house…then led Willie onto the porch and stood over him for five or six seconds before, without provocation, shooting him in the jaw." Id. at 236. The trial court found two aggravators, prior violent felony and burglary/pecuniary gain. The prior violent felony aggravator was based on four prior violent felony convictions, a 1989 aggravated assault for shooting at his brother, a 1989 aggravated battery for shooting David Greenwall, and Johnson's contemporaneous convictions as a principal to the robbery and attempted murder of Big Gaines committed by codefendant Anthony. In mitigation, the trial court gave very

little or slight weight to Johnson's age of 22, his surrender to police, his troubled childhood, that he was a good son and neighbor, and that he has a young child, and gave substantial weight to the fact that that he earned a G.E.D. and participated in high school athletics.

This Court concluded these circumstances supported vacating the death penalty, reasoning that the prior violent felony aggravator was not as compelling because it was based in part on an aggravated assault committed on Johnson's brother, Anthony, which Anthony said did not injure him and was the result of a misunderstanding, and in part on Johnson's contemporaneous convictions as a principal to crimes committed by Anthony. The Court concluded that Johnson's crime was not among those for which the death penalty is specifically reserved.

In Scott, the defendant was convicted of aggravated battery and first-degree murder in the attempted robbery of a coin laundry. As Scott entered the laundry, he hit one man in the back of the head with the butt of his gun. When the homicide victim, who was sitting on the floor, got up and told Scott he didn't have any money and to leave, Scott fired a fatal shot to his face. In a wired conversation with a co-defendant who helped plan but was not present during the robbery, Scott claimed he shot the man after he told Scott to get out of the store and grabbed a chair like he was going to hit Scott. The

trial court found two aggravators, prior violent felony based on the contemporaneous aggravated battery and committed during an armed robbery. In mitigation, the trial court found religious faith, mutual love for family and friends, father absent from his life, good and respectful son, good surrogate father, can be a good father figure from prison, overheard domestic abuse as a small child, and once stopped a man from stealing from a grocery store, all of which were given little or slight weight.

In addressing the proportionality of the death sentence, the Court noted that the prior violent felony aggravator was based on the contemporaneous battery, which involved a limited threat of violence and no permanent injury, as compared with cases where the prior violent felony aggravator was based on non-contemporaneous crimes or more serious contemporaneous crimes, such as attempted rape or another murder. The Court reasoned that though not precisely like other "robbery gone bad" cases where it had reduced the sentence of death to life, there was no evidence Scott planned to shoot anyone in the coin laundry prior to doing so, and "therefore the murder could be viewed as a reactive action in response to the victim's resistance to the robbery." In addition, that Scott left the laundry without attempting to shoot anyone else further supported the inference that he lacked a pre-arranged plan to murder. The Court vacated the death sentence, finding the case

did not fall within the narrow category of the most egregious of murders.

When the facts of the present case are compared to the preceding cases, it is clear that equally culpable defendants have received sentences of life imprisonment. The defendants' intent in most of the above cases is no less clear than Yacob's intent here. The defendant in Thompson shot a sandwich shop clerk in the top of the head from a distance of a few feet, within moments of walking into the shop. The defendant in Sinclair shot a cab driver twice in the head. The defendant in Williams shot the victim eight times, including once in the back at a distance no further than ten inches, consistent with Burke lying face down or being on all fours when shot. The defendant in Terry shot a woman in a gas station robbery. The defendant in Johnson shot the victim five times, including once in the face after standing over him for five or six seconds. And the defendant in Scott shot the victim point-blank in the face. Although it may not be crystal clear what transpired just before these victims were shot, the intent demonstrated by the placement of the shots and the distance between the defendant and the victim when the victim was shot is quite clear. In all of these cases except Terry, which does not say where the victim was shot, the victims were shot at point-blank range at least once and several were shot multiple times.

Here, in contrast, we know that Yacob was leaving the story after the robbery with no intent to shoot or hurt anyone. We know that Yacob had no pre-arranged plan to kill. We know that Yacob shot Maida in reaction to Maida activating the switch that locked the front doors. We know that he shot at Maida through what was believed to be bulletproof glass. And, we know that Yacob was unaware he had killed Maida.

Accordingly, the facts of this crime do not set it apart from other robbery-murders which this Court has determined do not warrant the death penalty. Like Scott and Johnson, and the other cases discussed above, the present offense was an unplanned murder committed in reaction to resistance to a robbery and is not one of the most aggravated of first-degree murders.

Nor is this case one of the least mitigated. The mitigation in this case is comparable to or more compelling than that in the single-aggravator cases discussed above in which the death sentence was found disproportionate. Contrary to the trial judge's assessment, Yacob's life experiences have hardly been "unremarkable." He was born in a third-world country, Eritrea, Africa, the product of an arranged marriage. His mother was 13 years old and his father had already left the country when he was born. He and his mother moved to Ethiopia when Yacob was two years old, due to the emerging civil war.

When Yacob immigrated with his mother to the United States when he was 13, his father had a new family and new children. Yacob's adjustment to a completely different culture and the family situation was difficult. When Yacob was 14, his father was arrested and prosecuted for striking Yacob in the face, and Yacob was removed from the home and placed in a series of shelters for a year. Despite these difficulties and challenges, Yacob worked hard to graduate from high school and did so. There also is evidence in the record that Yacob is a respectful and obedient person, a hard worker, that he loves his family and they love him, and that he came to the defense of a boy being bullied. The mitigation in this case is not insubstantial.

This is not one of "the most aggravated and least mitigated" of capital crimes. See Dixon. The death penalty is not the appropriate punishment for Yacob, and this Court should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

ISSUE 3

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Yacob' Motion to Declare Florida's Death Sentencing Procedure Unconstitutional under Ring. R2:388-402. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2009), does not provide for such jury determinations.

Yacob acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 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.),

cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, Yacob 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). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-1135 (Fla. 2005) (including footnotes 4 & 4, and cases cited therein); Steele. At this time, Yacob asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Yacob's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate appellant's death sentence and reverse for a new penalty phase proceeding before the judge; Issue 2, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission and U.S. Mail to **STEVEN R. WHITE**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and by U.S. Mail to **MICHAEL MULUGETTA YACOB**, #A-131633, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, July 10, 2012.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

_____

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IN THE SUPREME COURT OF FLORIDA

MICHAEL MULUGETTA YACOB,

Appellant,

v. **CASE NO. SC11-2505**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
A	Sentencing Order