IN THE SUPREME COURT OF FLORIDA

GLEN JAMES OCHA,

Appellant,

v.

Case No. SC00-2507
Lower Tribunal No. CR99-2297

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR OSCEOLA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On November 1, 1999, the grand jury indicted Glen James Ocha, also known as Raven Raven, for the first degree murder of Carol Skjerva. (V1, 17-18). The State filed a notice of intent to seek the death penalty. (V1, 21). On December 30, 1999, the trial court granted Appellant's motion to appoint Dr. Robert Berland as a confidential psychological expert. (V1, 36-39).

On February 23, 2000, a hearing was conducted before the Honorable Frank N. Kaney, wherein defense counsel, Kenneth Komara, informed the trial judge that Appellant indicated that he wanted to waive his right to a jury trial and enter a plea to first degree murder. Appellant also instructed defense counsel not to present any mitigating evidence on his behalf. Defense counsel requested that experts be appointed to determine Appellant's competency to proceed. (V2, 287-94). The trial judge appointed Drs. Daniel Tressler and Alan Berns to examine Appellant to determine his competency. (V1, 62-78).

On May 17, 2000, the State called Drs. Tressler and Berns to testify to their findings. Dr. Tressler testified at the hearing that prior to examining Appellant at the Osceola County Jail on April 7, 2000, he reviewed investigative reports from the crime, Appellant's taped statement to law enforcement officers, and jail psychiatric records. (V2, 299-304). At his

examination, Dr. Tressler administered the Minnesota Multiphasic Personality Inventory 2 (MMPI) to Appellant. Dr. Tressler testified that Appellant's MMPI results indicated that he was not attempting to grossly distort the results in a favorable or unfavorable manner, but he did "demonstrate a tendency to portray himself favorably with regard to moral issues, but he was more than willing to endorse items that reflected aberrant mental status and aberrant experiences in his life." (V2, 305). Based on his evaluation, Dr. Tressler concluded that Appellant was competent. (V2, 307).

Dr. Alan Berns also found Appellant competent to proceed and diagnosed him as having a history of polysubstance abuse and a depressive disorder. (V2, 319-23). Appellant also displayed antisocial traits and complained of having a loss of his peripheral vision and impairment of balance. Dr. Berns recommended that Appellant undergo a neuropsychiatric evaluation to rule out the possibility of a lesion in the brain, or a tumor or mass. (V1, 70; V2, 323). If Appellant had some sort of brain mass or tumor, Dr. Berns concluded that it was not interfering with his mental functioning to any significant degree, but it may be contributing in some part to his depression. (V2, 323-24).

Defense counsel called Dr. Berland as an expert witness at

the competency hearing. Dr. Berland did not personally meet with Appellant so his opinion was qualified and based solely on a review of evidence from other sources. (V2, 333-36). Dr. Berland opined that Appellant's MMPI results raised a serious question about his ability to consult with his attorney with a reasonable degree of rational understanding. (V2, 337). Dr. Berland testified that Appellant's score on the "L" scale of the MMPI reflected the presence of delusional paranoid thinking. (V2, 341-42). According to Dr. Berland, Appellant's score on the schizophrenia scale indicated that he was suffering from a psychotic disturbance at the time the test was taken. (V2, 343-44). Because Dr. Berland did not examine Appellant and was unable to hear his responses to questioning from the other experts, he was unable to give a definitive opinion regarding Appellant's competency to proceed, but he did opine that there "is substantial evidence that he may not be competent." (V2, 346).

After hearing testimony from the experts and reviewing their reports, the trial judge found Appellant competent to proceed and to plead guilty to first degree murder and waive the guilt phase and advisory penalty phase jury. (V2, 354-56). Defense counsel prepared and reviewed with Appellant a number of documents, including a Waiver of Jury Trial, Waiver of

Presentation of Mitigation Evidence, and a Plea Form and accompanying affidavit. (V1, 89-94; V2, 356). Appellant then withdrew his not guilty plea and pled guilty to first degree murder as charged in the indictment. (V2, 356-65). The trial judge ordered the preparation of a pre-sentence investigation report (PSI) prior to sentencing.

On July 6, 2000, the trial court conducted the penalty phase hearing. (V3, 368-442). Defense counsel reiterated that Appellant did not want any mitigation evidence presented, but counsel informed the court that it was his obligation under existing caselaw to proffer mitigation evidence. (V3, 368-72). The State presented evidence on three aggravating circumstances: (1) Appellant has a prior conviction for a felony involving the use or threat of violence to a person; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was cold, calculated, and premeditated (CCP). In support of the first aggravator, the State introduced into evidence copies of judgment and sentences from Kentucky establishing that Appellant was convicted for attempted premeditated murder and robbery in the first degree.[1]

Dr. Sashi Gore, the Chief Medical Examiner for District

[1]In 1984, Appellant robbed and shot Kiran Patel in the head with the intent to kill him. (V2, 252).

Nine, testified that he responded to a private residence and observed the victim's body stuffed into an entertainment center in the garage. (V2, 374-77). Dr. Gore testified that a ligature was utilized on the victim's neck to cause her death by strangulation.[2] He opined that, depending on the pressure on the neck, the victim would have lost consciousness within thirty seconds to three or four minutes. (V3, 382-85). In addition to the neck injuries, the autopsy revealed that the victim lost one of her fake fingernails on her left hand. The doctor could not determine whether the fingernail was lost before or during the struggle. (V3, 384-85).

The State also introduced into evidence Appellant's post-Miranda statement to law enforcement officers. (V3, 394-99). Appellant met the victim, Carol Skjerva, at Rosie's Pub. Appellant rode his bicycle to the pub and because it was raining, the victim offered to drive Appellant home. Once at Appellant's residence, they engaged in consensual sex. Afterwards, when Appellant indicated that he was finished, the victim began calling him "goofy ass names" like "little dick" and "mosquito dick." (S.114). Ms. Skjerva told Appellant that

[2]Law enforcement officers located a rope in the garage which had some of the victim's hair entangled in the strands. (V3, 386-87; 399-400). Appellant admitted that he used this rope to strangle and subsequently hang the victim. (V3, 400).

she was going to tell her boyfriend and he would come over and "stomp your ass." (S.114). When Ms. Skjerva attempted to grab Appellant's shirt, he told her to "sit her fuckin' ass in the chair." (S.114).

> I told her . . . don't move. And I could tell by the look on her face that she was scared, 'cause I must of not been lookin' very good. Pow!! But she didn't move. I kind of paced back and forth. Thinkin' well just, knock this bitch's lights out. Sayin' why are you thinkin' like that? Why you thinkin' like that? Just tell her to go home. Just tell her to go home. But no, I didn't tell her to go home. Inside the garage door on the side was a box. A bunch of little ties, other little ties, stupid little ties. I just walked into it and there was one on my side, and my heart was pumpin', and I was scared. And I came from the side and just as I whopped it up around, she said no. And I clamped it down tight and used my other hand, and pulled it just as tight as I could, and I lifted her up off the floor. Well she was tryin' to grab the rope. And I was liftin' her higher and higher off the floor. She still tryin' to grab hold of the rope, and she couldn't. She was slippin'. She had her socks on. She was slippin' all over the kitchen floor, and I kept holdin' her and man, I said man, she's heavy but I can't let her down, and then I heard piss. Sorta scared her and she went real limp. I said no, I've killed her. That's what they say when they piss on their selves and shit on their selves, they're dead. Well, I kind of looked at her face and her eyes was lookin' straight ahead and her face was just as purple, just as a purple and her eyes was purple too and just was oh, so I let go of the rope. As soon as I did you'd hear (make sound). And she was tryin' to breathe again so I had to tighten it back up again. . . .
>
> Oh, Lord. So I'm panicking. She ain't dying. She's in half way in between. I don't know what the hell I'm gonna do. Her heartbeat is still on her neck but her face purple. Eyes stickin' out. Her eyes won't close. Tongue stickin' out. I was scared. If I done somethin' bad, wrong to her and fucked up her

> head somehow. I didn't want her to end up like a vegetable or somethin'. . . .
>
> So I'm committed. I got to go all the way now and I didn't want it to take that long. It shouldn't, shouldn't of took that long. But she just, she won't, she won't go. She was doin' it, be fuckin' with me or somethin'. She, she just won't go and then I was hangin' onto her. Hangin' on to her. Lord, it was wearin' me out, and then when I let go I think it was over. She go (makes sound like to breathe). I said oh Lord, here we go again. I'd have to grab her harder, and twist her, and everything. So I got down to point, I said I, I can't hang onto this no more, 'cause I'd lay her on the floor and I'd, I, I'd listen for the hole, the beat on her neck and, and lift up her shirt to listen to her chest, and sometimes it would be real fast and other times it would be real faint. I said what am I gonna' do? Please, let this be over. Please, let it be over. So I had to twist up the rope a little bit, and I pulled her up over the door. . . .

(S.114-15).

Appellant used the door as a lever to hang the victim. He shut the door and the rope caught in a groove. The victim hanged on the garage side of the door and Appellant remained in the kitchen and drank a beer. (S.115-16).

In presenting the proffered mitigation, the parties stipulated that the earlier competency hearing testimony and reports from Drs. Berns, Tressler, and Berland would be admitted in the penalty phase and considered by the court as possible mitigation. (V3, 406-08). Defense counsel then called Dr. Berland to testify as to possible mitigation. Dr. Berland prepared a report with 15 potential mitigators and summarized

for the court the accompanying documents in support of these mitigators. (V1-2, 144-249; V3, 408-35).

The trial judge issued a sentencing order finding the existence of two aggravating factors: (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; and (2) the capital felony was especially heinous, atrocious, or cruel. The court concluded that the evidence did not support the existence of the cold, calculated and premeditated aggravating circumstance. (V2, 250-54).

The court reviewed and considered the proffered mitigation, including the expert testimony at the competency hearing, the PSI, and the written reports from Drs. Tressler, Berns, and Berland. The judge found and gave weight to 14 of the 15 proposed mitigators.[3] The judge gave "some" weight to the following mitigators: (1) history of suicidal thinking; (2) considerable artistic ability; (3) extensive history of alcohol and drug abuse; (4) intoxication at the time of the murder. (V2, 255-58). The judge gave "little" weight to the remaining

[3]The court rejected the mitigating factor that Appellant successfully served in the military and received service awards. The court rejected this mitigator because the evidence established that it was not true. Appellant was discharged from the military for using drugs and, as he acknowledged, the only service "awards" he received were "I was there" awards worn by all the soldiers in his unit. (V2, 256-57).

proposed mitigators: (5) good prisoner; (6) two severe head injuries; (7) learning disability; (8) capable of forming a warm, caring relationship; (9) urged his ex-wife to seek to establish herself in a higher paying, more professional career; (10) may suffer from post-traumatic stress disorder; (11) chaotic and violent childhood; (12) remorseful; (13) psychiatric disturbance; and (14) hard worker. The court concluded that the aggravating circumstances far outweighed the mitigating factors and sentenced Appellant to death.

SUMMARY OF ARGUMENT

Issue I: Appellate counsel, relying on Muhammad v. State, 782 So. 2d 343 (Fla.), cert. denied, 70 U.S.L.W. 3235 (Oct. 1, 2001), argues that the trial court abused its discretion in failing to order Appellant to undergo further mental health testing. Although the prospective procedure set forth in Muhammad was not in effect at the time of Appellant's sentencing and is therefore inapplicable, the trial judge nevertheless foresaw the change in law and followed this Court's Muhammad decision.

Furthermore, contrary to appellate counsel's assertion, the trial judge did not abuse its discretion by failing to require further mental health testing because the judge lacked the authority to compel Appellant to undergo testing in order to present possible mitigation evidence that Appellant chose not to introduce. Additionally, counsel has failed to show that there was any particularized need for this type of testing or that Appellant suffered any prejudice from the lack of such testing.

Issue II: The trial judge properly found that the instant murder was especially heinous, atrocious, or cruel. Appellant's statement to law enforcement indicated that he strangled a conscious victim, Carol Skjerva, with a ligature for a great length of time while she struggled. Appellant released her at

one point, but she was still breathing and gasping for air. Appellant then continued to strangle her with a rope. Eventually, Appellant became physically exhausted from trying to strangle her and resorted to utilizing a door as a lever to hang the victim. Based on this evidence, the trial judge properly concluded that the evidence supports the HAC aggravating circumstance.

Issue III: This Court has routinely rejected the argument that it should recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988). In this case, the trial court followed the applicable procedures in determining the appropriate sentence. Although Appellant waived the presentation of mitigating evidence and sought the death penalty, his appointed trial counsel proffered numerous mitigating circumstances based on his investigation of Appellant's background and character. The trial court heard testimony from three mental health experts and reviewed their written reports. The court also ordered a PSI and considered the information contained within the PSI prior to imposing sentence. Appellate counsel has failed to show any reversible error in the procedure utilized by the trial judge in imposing a lawful sentence. Thus, this Court should reject appellate counsel's invitation to recede from Hamblen and affirm the trial court's sentence.

ARGUMENT

ISSUE I

APPELLATE COUNSEL'S ARGUMENT THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO INVESTIGATE POSSIBLE STATUTORY MITIGATION IS WITHOUT MERIT.

Appellate counsel advances the theory, contrary to Appellant's direction, that the trial judge abused his discretion by failing to order further mental testing and evaluation to determine possible mitigation evidence. Appellate counsel's entire argument on this point is premised on this Court's decision in Muhammad v. State, 782 So. 2d 343 (Fla.), cert. denied, 70 U.S.L.W. 3235 (Oct. 1, 2001), wherein this Court stated, "if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses." Although the "prospective procedures" announced in Muhammad were not in effect at the time of Appellant's sentencing, the trial judge foresaw the concerns of this Court and ordered and considered a PSI prior to sentencing Appellant as subsequently required by Muhammad. The trial judge, however, clearly did not abuse its discretion by

failing to order any further mental health testing.[4]

The instant case is similar to Robinson v. State, 684 So. 2d 175 (Fla. 1996) ("Robinson I") and Farr v. State, 621 So. 2d 1368 (Fla. 1993), wherein the defendants pled guilty, waived their right to a penalty phase jury, and asserted their desire to be sentenced to death. In Farr, this Court stated:

> [M]itigating 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 at 1369. In those cases where a defendant waives the presentation of mitigating evidence, defense counsel must comply with the procedure set out 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 court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of

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[4]Although the "prospective procedures" set forth in Muhammad are not applicable to this case, and thus, counsel's argument is without merit, the State will nevertheless address appellate counsel's argument that the trial judge abused its discretion in failing to order further mental health testing. See Muhammad, 782 So. 2d at 365 (stating that prospective procedures are not applicable to cases which were tried but not yet decided on appeal at the time this opinion is rendered).

penalty phase evidence.

Robinson I, 684 So. 2d at 177. Recently in Muhammad, this Court extended the procedure to include the requirement that a trial judge order and consider a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence. Muhammad v. State, 782 So. 2d 343 (Fla.), cert. denied, 70 U.S.L.W. 3235 (Oct. 1, 2001).

In the case at bar, appellate counsel concedes that the trial judge followed the procedure set forth in Koon, Farr, and Robinson I. In fact, counsel must also acknowledge that the trial judge foresaw the change in the law in Muhammad and ordered and considered a PSI in this case. Counsel's only argument is that the trial judge did not extend the law even further and somehow abused his discretion by not ordering additional mental health testing. This argument is without merit and lacks legal support.

Admittedly, this Court in Muhammad stated that the trial court has the discretion to call persons with mitigating evidence as its own witnesses, but such a decision is subject to the abuse of discretion standard of review. Under the abuse of discretion standard of review, the appellate court pays substantial deference to the trial court's ruling. Discretion

is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. Trease v. State, 768 So. 2d 1050, 1053 n.2 (Fla. 2000) (citing Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)). The abuse of discretion standard is one of the most difficult for an appellant to satisfy. Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997). Here, the court did not abuse its discretion in failing to call any witnesses or in failing to order further mental health testing.

Appellate counsel has failed to cite any authority to this Court which authorizes a trial judge to order mental health testing on a competent defendant who refuses to present mitigating evidence. See Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988) (stating that trial judge does not have power to compel a competent defendant who has waived counsel and presentation of mitigating evidence to cooperate and divulge mitigating evidence to appointed counsel or doctors); see also Waterhouse v. State, 26 Fla. L. Weekly S375 (Fla. May 31, 2001) (finding that defense counsel was not ineffective for failing to present mitigation evidence because defendant refused to meet with doctor to determine whether he had possible organic brain damage). Clearly, this Court's Muhammad decision cannot be read

to authorize such action. This Court stated that a judge may, in his discretion, call witnesses who possess mitigating evidence. Muhammad, 782 So. 2d at 364. Contrary to appellate counsel's argument, this decision does not mandate that a trial judge has the responsibility to develop additional mitigation evidence by forcing a competent defendant to undergo further mental health testing.

In this case, Appellant was examined by Drs. Berns and Tressler to determine his competency to proceed. Defense counsel also requested that Dr. Berland be appointed to conduct a confidential psychological evaluation. Appellant cooperated with Drs. Berns and Tressler, but chose not to meet with his confidential expert, Dr. Berland. Appellate counsel argues that the court should have followed Dr. Berns' recommendation and ordered Appellant to undergo a neuropsychiatric evaluation.[5] Of

[5]As previously noted, Dr. Berns recommended that Appellant undergo a neuropsychiatric evaluation to rule out the possibility of a brain tumor or mass.

Appellate counsel also argues that the court erred because Dr. Berland alerted the court that his testimony was incomplete. Initial Brief of Appellant at 19. Dr. Berland testified that he obtained information from Appellant's ex-wife regarding his possible psychotic symptoms, but Dr. Berland "would have sought further and more elaborate verification of that had I been able to conduct the evaluation more fully." (V3, 432-33). As noted, Dr. Berland did not personally meet with Appellant to perform an evaluation and all of his unchallenged, proffered testimony was qualified for that reason. Dr. Berland, unlike Dr. Berns, never made a specific recommendation for testing, but simply complained that he was unable to perform a complete evaluation

course, given Appellant's desire not to present any mitigation evidence, it is logical to assume that he would not voluntarily consent to any neuropsychiatric testing.

In Robinson v. State, 761 So. 2d 269 (Fla. 1999) ("Robinson II"), cert. denied, 529 U.S. 1057 (2000), the defendant moved for a Single Photon Emission Computed Tomography (SPECT) scan which would have provided additional insight into Robinson's brain damage. This Court found that the trial judge did not abuse her discretion in denying this request because Robinson failed to establish any need for such test. Id. at 275. According to his expert witnesses, Robinson suffered from brain damage in the left temporal lobe but neither of his doctors testified that the test was necessary to complete their medical opinion; they merely stated that the exam would have been helpful. Id. at 275-76.

More recently, this Court addressed a trial court's decision to deny a defendant's motion for a Positron Emission Tomography (PET) scan to determine whether the defendant's brain was functioning properly. See Rogers v. State, 783 So. 2d 980 (Fla. 2001). In Rogers, Dr. Berland provided the trial court with an affidavit stating that a PET scan would be useful in evaluating the defendant's brain and mental functioning. Id. at 997-98.

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because Appellant would not speak with him.

This Court stated that the trial court's decision to deny the motion for a PET scan would not be disturbed absent an abuse of discretion. Id. at 998.

In evaluating whether the trial court abused its discretion, this Court generally looks at two factors:

> First, before the trial court will provide a defendant with the necessary funds for a PET-Scan, the defendant must establish a particularized need for the test, that is, that the test is necessary for experts to make a more definitive determination as to whether the defendant's brain is functioning properly and to provide their opinions about the extent of the defendant's brain damage. Second, this Court must consider whether the defendant was prejudiced by the trial court's denial of the motion requesting a PET-Scan.

Rogers, 783 So. 2d at 999. This Court ultimately concluded that the trial court did not abuse its discretion in denying the motion because Dr. Berland did not testify that the PET scan was necessary to complete his medical opinion regarding Rogers' brain damage. Furthermore, even had the first prong of the analysis been present, this Court concluded that the prejudice prong was not established because the trial judge found mitigating evidence relating to Rogers' mental condition. Id. at 999-1000.

In the instant case, it must be emphasized that Appellant did not request that any testing be performed on him to determine whether he might suffer from some level of brain

damage. Even Dr. Berns, the expert who broadly recommended neuropsychiatric testing, testified that such testing would only be useful in ruling out any possibility of a lesion in the brain. (V2, 323). Dr. Berns further testified that even if Appellant had some sort of brain tumor, it did not significantly interfere with his mental functioning: "If he does have some sort of mass it could be contributing in some part to [his] depression. But other than that, I did not detect any impairment from the possibility like that at this time." (V2, 323-24).

Thus, under the two-prong test set forth in Rogers, appellate counsel has failed to show any particularized need for this type of testing. Just like the experts in Robinson II and Rogers, Dr. Berns in this case indicated that the testing would be useful, but he did not indicate that the test was necessary. Appellate counsel's argument also fails the second-prong prejudice test. Dr. Berns indicated that even if Appellant had some type of brain tumor, it was not causing any significant impairment. Additionally, as in Rogers, the trial judge in this case considered and gave weight to a number of mental health mitigators, including two severe head injuries, a psychiatric disturbance, possible post-traumatic stress disorder, a learning disability, a history of suicidal thinking, an extensive history

of alcohol and drug abuse, and intoxication at the time of the murder. For these reasons, this Court should find that the trial judge properly considered the proposed mitigation evidence and did not abuse his discretion in failing to order further mental health testing.

ISSUE II

THE EVIDENCE SUPPORTS THE TRIAL JUDGE'S FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Appellant argues that the trial judge erred in finding the aggravating factor that the murder was especially heinous, atrocious, or cruel (HAC). Whether an aggravating circumstance exists is a factual finding reviewed under the competent, substantial evidence test. When reviewing aggravating factors on appeal, this Court in Alston v. State, 723 So. 2d 148 (Fla. 1998), reiterated the standard of review, noting that it "'is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt -- that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.'" Id. at 160 (quoting Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) (footnotes omitted)).

The State submits that the evidence supports the trial court's finding that this aggravating circumstance was established beyond a reasonable doubt. In finding that the State proved this aggravator beyond all reasonable doubt, the trial judge stated:

Dr. Sashi Gore, the chief medical examiner of District Nine, testified at the sentencing hearing that he first saw Skjerva's body on October 7, 1999. He estimated that she had been dead for approximately 48 hours. He said that while decomposition made it difficult, he was able to determine the manner and cause of death. Dr. Gore noted that on the left side of the victim's neck there was a contused area, the pattern of which indicated that it was caused by a closure or ligation. He also noted that there was no fingernail on Skjerva's left fifth finger. He described this as a defensive wound. Dr. Gore stated that if there were other wounds, they had been changed by decomposition. He further testified that the cause of death was aspiration due to strangulation by use of a ligature. Finally, Dr. Gore testified that it may take from 30 to 60 seconds or as much as three or four minutes before a person loses consciousness from strangulation and that compression of the neck is a painful death.

Ocha, in his statement to law enforcement, described the last few minutes of Carol Skjerva's life.

> I told her she better sit...in that chair.... [S]he looked up at me. And I said, "Don't move." And I could tell by the look on her face that she was scared, 'cause I must of not been lookin' very good. Pow! But she didn't move.... Inside the garage door on the side was a box. A bunch of little ties, other little ties, stupid little ties.... And I come from the side and just as I whopped [sic] it up around, she said no. And I clamped it down tight and used my other hand, and pulled it just as tight as I could, and I lifted her up off the floor.... She was still tryin' to grab hold of the rope, and she couldn't. She was slippin'. She had her socks on. She was slippin' all over the kitchen floor, and I kept holding her and man, I said man, she's heavy, but I can't let her down....

In Tompkins v. State, 502 So. 2d 415 (Fla. 1986), the Supreme Court of Florida reiterated its holding in previous cases, that "it is permissible to infer that strangulation, when perpetrated upon a conscious

> victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." Id. at 421 (citations omitted).
>
> This Court finds that the aggravating factor that Ocha's commission of this capital felony was especially heinous, atrocious, or cruel was proven beyond a reasonable doubt by competent substantial evidence.

(V2, R.252-53).

In Orme v. State, 677 So. 2d 258, 263 (Fla. 1996), this Court stated that strangulation creates a prima facie case for the HAC aggravating factor. Numerous cases from this Court have upheld the HAC aggravator when a conscious victim is strangled. See, e.g., Blackwood v. State, 777 So. 2d 399, 408-10 (Fla. 2000) (upholding HAC factor in strangulation case where victim was conscious during attack and feared her impending death); Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991) (finding that the strangulation of a conscious victim involves foreknowledge of death, extreme anxiety, and fear, and that this method of killing is one to which the factor of heinousness is applicable), rev'd on other grounds, 504 U.S. 527 (1992); Capehart v. State, 583 So. 2d 1009, 1015 (Fla. 1991) (stating that trial court did not err in finding HAC when defendant strangled sixty-two-year-old victim and medical examiner testified that victim would have remained conscious for up to two minutes); Hildwin v. State, 531 So. 2d 124, 128-29 (Fla.

1988) (upholding HAC aggravator where victim took several minutes to lose consciousness when strangled and was aware of her pending doom); Tompkins v. State, 502 So. 2d 415, 421 (Fla. 1986) (trial judge's finding of HAC supported by evidence that the victim struggled while Appellant strangled her and the medical examiner testified that death was not instantaneous).

In this case, the medical examiner testified that the victim would have lost consciousness, depending on the pressure, within thirty seconds to three or four minutes. (V3, 382-84). However, given Appellant's statement to police, this is a conservative estimate. According to Appellant, he attempted to strangle Ms. Skjerva with a rope he located in the garage. (Supp. 114). Appellant wrapped the rope around her neck and lifted her off the ground for a period of time until the victim lost control of her bladder. Her face turned purple and she became real limp. (Supp. 114). Appellant let go of the rope, but he heard the victim gasping for breath and observed a heartbeat, so he again attempted to strangle her to death. (Supp. 114-15). Appellant acknowledged that the victim put up an incredible fight for her life. According to Appellant, he did not want it to take so long, but she just would not die. (Supp. 115). Appellant continued to choke her to the point where it "was wearin' me out." (Supp. 115). He let go again

thinking it was over, but the victim kept breathing. Appellant listened to her heartbeat and concluded that he had to utilize a different method to finally kill her. (Supp. 115). He twisted the rope up and pulled the victim over to a door. Appellant placed the victim on one side of the door and used the rope to hang her over the doorway. Appellant closed the door while the victim hung on the other side. (Supp. 115-16). Appellant went into the kitchen, drank a beer, cleaned up, and changed clothes. Appellant returned after about five minutes and took Ms. Skjerva's now lifeless body down and attempted to break her neck. (Supp. 117-20). Appellant stuffed her body into an entertainment center in the garage and fled the scene.[6]

Clearly, based on Appellant's own statement and the medical examiner's testimony, this Court can conclude that the evidence overwhelmingly establishes that the instant murder was especially heinous, atrocious, or cruel. Contrary to appellate counsel's assertion in his initial brief that "[t]he entire incident consumed only at most a few minutes," the evidence established that the victim in this case fought Appellant's attempt to strangle her for a great length of time. See Initial

[6]Because of decomposition, the medical examiner could not determine whether there were defensive wounds on the victim hands. (V3, 384-87). The victim lost one fake fingernail off her left hand, but the medical examiner could not say whether she lost it during the struggle. (V3, 384-85).

Brief of Appellant at 25. Appellant physically tired himself out attempting to strangle the life out of Carol Skjerva. Eventually, Appellant resorted to using a door as a lever to hang the victim because he was physically unable to continue. Given this evidence, this Court should find that the trial judge properly concluded that the instant murder was committed in an especially heinous, atrocious, or cruel manner.

Furthermore, when compared with other capital cases, it is clear that Appellant's sentence is proportional. This Court has previously stated that its proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, compares the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). In conducting the proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the facts established in the instant case demonstrates the proportionality of the death sentence imposed. See LaMarca v. State, 785 So. 2d 1209 (Fla. 2001) (single aggravating factor of two prior violent felonies outweighed nonstatutory mitigation); Blackwood v. State, 777 So. 2d 399

(Fla. 2000) (upholding death sentence in strangulation murder where single aggravator of HAC outweighed one statutory mitigator and numerous nonstatutory mitigation); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (death sentence proportional where two aggravators, heinous, atrocious, or cruel and crime committed during the commission of a sexual battery, outweighed five nonstatutory mitigators), cert. denied, 121 S. Ct. 1663 (2001); Ferrell v. State, 680 So. 2d 390 (Fla. 1996) (affirming death sentence after proportionality review where defendant had one aggravator consisting of a prior second-degree murder, with several nonstatutory mitigating circumstances); Pope v. State, 679 So. 2d 710 (Fla. 1996) (holding death penalty proportionate where there were two aggravating factors – the murder was committed for pecuniary gain and defendant had been convicted of a prior violent felony – and where there were two statutory and three nonstatutory mitigating factors); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (holding death sentence proportional where single aggravator of HAC outweighed two statutory mitigators and three nonstatutory mitigators). Here, the trial judge found that the two aggravating circumstances of HAC and prior violent felony[7] far outweighed the mitigating factors.

[7]Appellant had previously been convicted of first degree robbery and attempted murder when he robbed and shot Kiran Patel, a hotel clerk, in the head. (V1, 86; V3, 372-74).

Based on these significant aggravating circumstances and only slight mitigation, this Court should affirm the trial court's sentence of death.

ISSUE III

APPELLATE COUNSEL'S ARGUMENT THAT THIS COURT SHOULD RECEDE FROM HAMBLEN V. STATE, 527 SO. 2D 800 (FLA. 1988), IS WITHOUT MERIT.

In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), the defendant represented himself and pled guilty and waived his right to a jury advisory sentence. At the penalty phase, Hamblen presented no mitigating evidence and agreed with the prosecutor's recommendation of the death sentence. Id. at 801-02. On appeal to this Court, the public defender's office argued that the trial court erred in allowing Hamblen to waive counsel in the penalty phase, where, as a result, there was never any adversary proceeding to determine whether death or life imprisonment was the appropriate penalty. Id. at 802. This Court disagreed and held that a competent defendant has a right to represent himself and to waive the presentation of mitigating evidence so long as the trial judge analyzes the available evidence and determines the proper sentence. Hamblen, 527 So. 2d at 804. This Court has repeatedly declined invitations to recede from Hamblen. See Hauser v. State, 701 So. 2d 329 (Fla. 1997); Lockhart v. State, 655 So. 2d 69 (Fla. 1995); Farr v. State, 621 So. 2d 1368 (Fla. 1993); Henry v. State, 613 So. 2d 429 (Fla. 1992); Pettit v. State, 591 So. 2d 618 (Fla. 1992); Clark v. State, 613 So. 2d 412 (Fla. 1992).

Subsequently, in Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993), this Court set forth the prospective procedure to be utilized when a defendant waives the presentation of mitigating evidence:

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

In Farr v. State, 621 So. 2d 1368 (Fla. 1993), this Court extended this duty to consider mitigation to cases where the defendant argues in favor of the death penalty, as well as where the defendant asks the court not to consider mitigating evidence.

In this case, appellate counsel acknowledges that the court complied with Koon and Farr, but appellate counsel questions defense counsel's investigation of potential mitigation. In support of his claim that defense counsel may have "latched onto" Appellant's instruction to waive mitigation, appellate counsel cites to the fact that Dr. Berland had not spent any time with Appellant in preparation of his testimony. This argument is misplaced and without merit.

Defense counsel attempted to have Dr. Berland examine

Appellant, but his client chose not to meet with the doctor. As previously discussed, Appellant cannot be compelled to submit to an evaluation by this doctor for the purpose of developing mitigation. Even if there was some authority for such a proposition, Appellant could thwart any evaluation by choosing not to cooperate and/or giving misleading information to the doctor. Here, defense counsel utilized Drs. Berns and Tressler's testimony and written reports on Appellant's competency to develop potential mitigators. In addition to this testimony, defense counsel had Dr. Berland review all the available material, jail records, correspondence, expert reports, etc. and testify to his conclusions based on this information. Dr. Berland also telephoned persons with information about Appellant in an attempt to develop more mitigation evidence. Thus, it cannot be said that defense counsel did not zealously investigate possible mitigation on behalf of Appellant. See generally Waterhouse v. State, 26 Fla. L. Weekly S375 (Fla. May 31, 2001) (stating that defense counsel did not latch onto defendant's refusal to present mitigation when defendant failed to meet with mental health expert -- defense counsel introduced into evidence affidavit from expert explaining that defendant may have been under the influence of extreme emotional disturbance at the time of the crime);

Chandler v. State, 702 So. 2d 186, 199-200 & n.19 (Fla. 1997) (rejecting claim that defense counsel did not adequately investigate and present evidence of defendant's background when defense counsel informed trial judge that witnesses would say favorable things about defendant but counsel did not go into further detail about "what that favorable evidence would be").

Finally, a review of the trial court's order indicates that the court did not simply "rubber-stamp" the State's position advocating the death sentence. The trial judge, as in Hamblen, made a thoughtful analysis of the facts and disagreed with one of the prosecutor's proposed aggravating factors. See Hamblen, 527 So. 2d at 804 (stating that trial judge's disagreement with the State on the HAC aggravator indicated that the judge was not merely rubber-stamping the State's position); Hauser v. State, 701 So. 2d 329, 331 (Fla. 1997) (finding that the trial court bent over backwards to give full consideration to the proffered mitigation, accepting it as proven, and the court thoughtfully and deliberately weighed the aggravating and mitigating factors). Here, the court rejected the State's aggravating circumstance that the murder was cold, calculated and premeditated. Furthermore, the court heard the testimony of three mental health experts and reviewed their written reports. The court also analyzed the information contained in the PSI

prior to imposing his sentence. The trial judge carefully considered and weighed the aggravating and mitigating circumstances found to exist and concluded that the aggravating circumstances far outweighed the mitigating factors. Accordingly, the trial judge imposed the sentence of death. Appellate counsel has failed to demonstrate any reversible error in the procedures utilized by the trial judge in imposing this sentence. As such, the State urges this Court to reject appellate counsel's invitation to recede from Hamblen and affirm Appellant's death sentence.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the trial court's 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 U.S. mail to George D.E. Burden, Assistant Public Defender, Public Defender's Office, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, on this 9th day of November, 2001.

_____
COUNSEL FOR APPELLEE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE