IN THE SUPREME COURT OF FLORIDA

GLEN JAMES OCHA,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC00-2507
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENTS

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN FAILING TO INVESTIGATE MENTAL MITIGATION IN VIOLATION OF THE APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The trial court was alerted by experts Dr. Berns and Dr. Berland that their expert opinion testimony was incomplete. Only with further testing and investigation could appellant's mental condition be fully understood. The trial court properly rejected appellant's demands to save the taxpayer's money and summarily sentencing appellant to death explaining to the appellant that the court

was not going to be a party to the appellant's suicide. However, the trial court did not require any further testing or evaluation.

The state argued in their answer brief that the "prospective procedures" announced in Muhammad v. State, 26 Fla. L. Weekly S224 (Fla. April 5, 2001), were not in effect at the time of appellant's sentencing, therefore the argument has no merit. The state's position ignores this Court's long standing constitutional requirement that in performing proportionality review it must "engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases." Porter v. State, 564 So.2d 1060, 1064 (Fla.1990); see, e.g., Urbin v. State, 714 So.2d 411, 416 (Fla.1998); Tillman v. State, 591 So.2d 167, 169 (Fla.1991).

The record in the instant case is replete with statements by mental health experts that there has been a lack of testing on the appellant to fully understand appellant's mental functioning at the time of the crime. As a result, despite the trial court's direction for appellant's counsel to present possible mitigation, this effort was constitutionally in firmed because possible mental mitigation was not provided. Without the investigation of the mental mitigation and a record of the result, it is difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty

cases.

The state further argued that should the trial court been required to investigate mitigation, such decision is subject to abuse of discretion standard of review. Appellant concedes that this Court has held that whether a trial court authorizes requested mental health testing is subject to the abuse of discretion standard. See Rogers v. State, 783 So.2d 980 (Fla. 2001) The appellant submits that the Rogers analysis[1] is difficult to apply to the instant case.

In Rogers, there is trial counsel, defense experts and the defendant cooperating as a team to develop mitigation. This Court recognized in Rogers that there was no abuse of discretion because mental mitigation was suggested and presented, and requested testing would only further corroborate the presented claims of mental mitigation. By contrast, in the instant case there is a death volunteer where possible mental mitigation is not tested for at all; and therefore not considered by the trial court in sentencing or this Court in performing

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[1] First, before the trial court will provide a defendant with the necessary funds for a test procedure, 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 test procedure. Rogers at 999.

proportionality review. Therefore, this Court should find that the appellant was denied a fair penalty phase trial where the trial court was alerted to possible mental mitigation by mental health experts, and took no action to investigate whether such mental health mitigation exists.

Ocha relies on the argument and authority set forth in the Initial Brief of Appellant in reference to the following points on appeal:

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL WHERE THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING FACTOR.

POINT III

THIS COURT SHOULD RECEDE FROM HAMBLEN.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the sentence of death and remand for a new penalty phase with direction that the argument for a life sentence be fully developed for this Court's consideration.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed via U.S. Postal Service to Steven Ake, Assistant Attorney General, Capital Litigation, 2002 N. Lois Avenue, Westwood Center, 7th Floor, Tampa, FL 33607 and mailed to Mr. Glen James Ocha, #911117, Florida State Prison, P.O. Box 181, Starke, FL 32091, this 10th day of January, 2002.

_____

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER