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

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CITATIONS

OTHER AUTHORITIES CITED:

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PRELIMINARY STATEMENT

In referring to the record on appeal, the following symbols will be used:

The record on appeal consists of three volumes and will be symbolized by Volume I - (I); Volume II - (II); Volume III - (III);

The supplemental record consisting of transcript of a confession made by the appellant to law enforcement will be symbolized by (S).

STATEMENT OF THE CASE

Glen James Ocha also known as Raven Raven, hereinafter referred to as appellant, was indicted for first degree murder for the strangulation of Carol Skjerva. (I 17) The state filed the notice of intent to seek the death penalty. (I 21) Dr. Robert Berland was appointed as a psychological expert for the purposes of conducting a confidential psychological evaluation of the appellant. (I 38)

The trial court appointed experts for a competency evaluation to determine the appellant's competency to participate in pretrial hearings; the entry of a plea; the trial of the case, and sentencing. (I 53) The court appointed experts, Allan S. Berns and Daniel P. Tressler, found appellant competent to proceed. (I 71,78) The appellant waived his right to a jury trial in both the guilt phase and sentencing phase. (I 89) The appellant waived his right to the presentation of mitigation evidence. (I 90) The appellant entered a written plea of guilty to first degree murder. (I 91) The state had made no plea offer and disclosed that they would be seeking the death penalty. (I 91) The counsel for appellant, Kenneth J. Komara, was directed by appellant through a written affidavit to not to present any mitigation

evidence on his behalf. (I 93)

The appellant objected to the question of how long an individual would have to be strangulated by some sort of ligature before they would loose consciousness. (III 382) The trial court overruled the objection stating that the doctor can give his opinion on how long it takes the human body to lose consciousness based on his experience. (III 382)

Counsel for the appellant submitted a memorandum of law making a proffer of mitigation. (I 122) Counsel for the appellant proposed 15 potential mitigators. (I 125) The state submitted a sentencing memorandum where they argued that there were three aggravating factors including the appellant was previously convicted of a felony involving the use or threat of violence to the person; (2) that the capital felony was especially heinous, atrocious or cruel; and (3) the capital felony was committed in a cold calculated and premeditated manner without any pretense or moral or legal justification. (I 133)

The trial court issued a sentencing order wherein the court found two aggravating factors: that the appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; and the capital felony was especially heinous, atrocious or cruel; and rejected the statutory aggravating factor that the capital felony was committed in a cold calculated and

premeditated manner. (II 253) The trial court found the existence of 14 nonstatutory mitigators, and rejected one of the requested non-statutory mitigating factors. (II 254) The trial court concluded that the aggravating circumstances in this case far outweigh the mitigating circumstances presented and sentenced the appellant to death. (II 258; III 459) Appellant filed a Notice of Appeal on November 28, 2000. (II 265) This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

Appellant had sexual relations with a woman[1] that "wanted to fuck around, until she hurt you." (S 1) The appellant told the woman he was done, he was sore. (S 1) The woman started calling appellant names like mosquito dick. (S 1) At some point the woman threatened the appellant that she was going to tell her boyfriend or husband, and that he was going to come over and stomp the appellant's ass. (S 1)

The woman then grabbed appellant's T-shirt, and appellant told the woman that "she better sit her fuckin' ass in the chair." (S 1) The appellant could tell by the look on the woman's face that she was scared. (S 1) The appellant then grabbed a tie from the garage and wrapped the tie around the woman's neck and pulled it as tight as he could, and lifted her off of the floor. (S 1) The women tried to grab the rope and she was slipping on the kitchen floor. (S 1) The appellant then heard piss and the women went limp. (S 1) The appellant thought the women was dead as her eye's were looking straight ahead and her face was purple. (S 1)

The appellant let go of the rope, and the women then tried to breathe again. (S 1) The appellant tightened the rope again and needed to kill the women so that

[1] The woman was subsequently identified as Carol Skjerva. (I 1)

she did not end up as a vegetable. (S 2) The appellant did not want it to take that long, but the women would not die. (S 2) The appellant kept holding on until the women was dead. (S 2)

Dr. Sashi Gore was the medical examiner that examined the victim at the crime scene. (III 376) Dr. Gore found the victim's body in the garage of a private home located at 226 La Paz Drive in Kissimmee, Florida. (III 376) The body was found in an entertainment center in the garage. (III 377) Dr. Gore came in contact with the body about 48 hours after the time of death. (III 379) The level of body decomposition made it difficult to make an accurate evaluation of the cause of death. (III 379)

The victim had a pattern type of contused area around the neck which was likely produced by some type of ligature. (III 380) In Dr. Gore's opinion, the cause of death was asphyxiation due to ligature strangulation. (III 382) Dr. Gore testified that it takes from 30 seconds to 3 to 4 minutes to lose consciousness and compression of the neck is a painful process. (III 384) Dr. Gore was not able to find any defensive wounds on the hands, but observed the loss of a fake fingernail on the left pinky and could not determine whether that nail was lost before or during the struggle. (III 385) During the autopsy, the doctor observed hemorrhage in the soft tissues of the neck, however the hyoid bone, and the thyroid cartridge in the

neck were both intact. (III 385)

Counsel for the appellant did not cross-examine doctor Gore based upon instructions of the appellant. (III 387) The appellant also instructed his attorney not to cross examine Ed Boykin, a deputy sheriff with the Osceola County Sheriff's Department. (III 404)

The appellant was convicted in the state of Kentucky of attempted premeditated murder and robbery with a firearm in the first degree. (III 373)

Counsel for appellant proceeded with a proffer of mitigation. (III 406) The parties stipulated that the testimony from Dr. Berns, Dr. Tressler, and Dr. Berland be made part of the sentencing hearing and be considered as possible mental mitigation in this case. (III 406) Dr. Berland testified that he reviewed the appellant's Kentucky prison records and that the appellant was a good prisoner. (III 410) Dr. Berland provided evidence that the appellant has a history of suicidal thinking. (III 412) The appellant's history of suicidal thinking dates back to August of 1978. (III 412) While being confronted by police in 1978, appellant stated all he wanted to do is die; and when apprehended exclaimed "shoot me, I want to die." (III 413) Once in jail, the appellant removed his jacket and tied it to the bars and hung himself. (III 413)

Berland provided evidence that the appellant used his artistic talent for the

good of others and to contribute to the common good. (III 413) While incarcerated, the appellant was asked to use his artistic talents to approve the appearance of buildings in the system. (III 414) The appellant received a thank you letter from Judge Ken Corey for his work. (III 414) Dr. Berland produced a newspaper report where it detailed how happy people were with appellant's painting of the Jefferson County Jail and praising appellant's artistic talent. (III 414) The appellant also used his artistic talents for the benefit of an academic school. (III 415)

The appellant had two severe head injuries as a child at age five. (III 416) The appellant fell down a big flight of stairs and was in a coma for two weeks, then he was blind for three days and had to learn to walk and talk after the fall. (III 416) The appellant also showed symptoms of a lesion or a tumor in his brain. (III 416) The appellant had complained of having decreased peripheral vision, difficulty with his balance at times and it was recommended by Dr. Berns that he undergo a full neuro-psychiatric evaluation to rule out the possibly of a tumor. (III 417)

The appellant has an extensive history of alcohol and drug use. (III 417) The appellant began drinking alcohol at age thirteen. (III 418) The appellant went on to drinking whiskey and wine daily. (III 419) The appellant consumed a six pack of beer daily since the age of eighteen. (III 419) The appellant had a history of

alcohol related blackouts and morning ingestion of alcohol. (III 419) The appellant used heroin at age fifteen by intravenous route three to four times a week, then off and on all of his life until 1981. (III 419) The appellant began using cocaine at age 15 and used cocaine approximately three to four times a week. (III 419) The appellant last used cocaine in 1980. (III 419) The appellant also had a history of using Seconal and Quaaludes as well as PCP. (III 419) Just before his arrest, appellant reported using Ecstasy which is a version of amphetamine speed. (III 419) The appellant said he did two hits of Ecstasy, two to three hours before the crime. (III 420)

The appellant had difficulty learning as a child and suffered with dyslexia and attention deficit disorder. (III 422) The appellant dropped out of school in the tenth grade. (III 423) The appellant left school because he could not keep up with the other students. (III 423)

The appellant was capable of forming warm and caring relationships. (III 423) The appellant functioned very well in the home, and he would prepare meals and have them ready for his wife when she came home from work. (III 423) The appellant also taught his stepson how to ride a bicycle. (III 423)

The appellant entered the army at age seventeen and served two years in Germany as a mechanized infantryman. The appellant had a general discharge

because he used drugs. (III 425) During his military service the appellant received the National Defense Medal and the European Citation. (III 425) The appellant agreed with the trial court's characterization that "Those are just I was there medals aren't they." (III 425)

The appellant suffers from recurrent dreams in which the man he killed appears to him. (III 426) This prevents him from sleeping. (III 426) This is a symptom that is consistent with post traumatic stress disorder. (III 426)

The appellant had a chaotic and violent home life as a child. (III 426) The appellant was physically abused from the time he was little until the age of thirteen and that his mother beat him with her fists and spoons. (III 426) The appellant's family has a history of mental illness and chemical dependancy. (III 427) The appellant's mother made multiple suicide attempts; set the house on fire; was an alcoholic and died in 1985 of diabetes. (III 427) The appellant has three sisters and all of them have been suffering from mental illness and have had psychiatric hospitalizations. (III 427) The appellant's mother molested him and mentally abused him. (III 427) The appellant's mother was a drinker, and the appellant left home at the age of fifteen because the family life was not good. (III 427) One example of the extensive abuse appellant suffered as a child was appellant's mother pushed a broom handle into his rectum as a punishment. (III 428)

The appellant has demonstrated genuine remorse for the crimes. (III 428) The appellant feels that the death penalty is just punishment for what he had done. (III 428) In Dr. Bern's and Dr. Tressler's reports the appellant expressed remorse for what he had done. (III 428)

The night of the offense the appellant had been drinking and took two small doses of MDMA commonly know as Ecstasy. (III 429) The appellant was intoxicated at the time of the offense. (III 429) The appellant suffers from a psychotic disturbance. (III 430) Dr. Berns differential diagnosis consisted of Bi-polar disorder in that during periods of absence of alcohol and drugs the appellant experiences mood swings, excessive energy spurts, rages and shopping sprees. (III 430)

The appellant currently has symptoms of depression which include increase in appetite, weight gain, fatigue and difficulty in concentration. (III 430) The results of appellant's M.M.P.I. test demonstrated that the appellant was someone who attempted to deny mental health problems and his score demonstrated a personality that is associated with delusional paranoid thinking which is part of a psychotic disturbance. (III 430) In spite of the appellant's efforts to minimize his mental health problems or suppress mental illness, the appellant had a psychotic profile with scale six, the paranoia scale, the highest score reflected in delusional

paranoid thinking way outside the normal range. (R 431) The appellant also had a scale eight on the schizophrenia scale which measures a broad range of psychotic symptoms. (III 431) The appellant's score on the F scale indicated a psychotic disturbance that is chronic or long lasting in nature. (III 431) The appellant also scored a sub-scale of eight on the schizophrenia scale which is a measure of hallucinations. (III 431) A score of four more on that scale would indicate hallucinations with high reliably. (III 431) Dr. Berland would have sought more elaborate verification of appellant's psychotic symptoms had he been able to conduct the evaluation fully. (III 433)

The appellant was a hard worker and showed an excellent attitude. (III 433) The appellant's employer would give him twelve hours worth of work in eight hours. (III 433) The appellant would take back work to his living quarters at night to complete. (III 433)

The trial court asked the relevance of Appellant's reported statement "And while pencils are available to him for his use, Ocha says he doesn't draw presently, I'm not worthy of my gift." (III 434) Dr. Berland replied "Well, of course, I'm guessing, since I haven't spent any time with him." (III 434)

Counsel argued in mitigation that the appellant cooperated with the state to resolve the crime. (III 436) After being arrested for disorderly intoxication in

Volusia County, appellant reported to jail personnel that he murdered a woman in Osceola County. (III 437) The appellant made several statements to law enforcement thereafter. (III 437)

SUMMARY OF ARGUMENT

The trial court improperly sentenced Ocha to death. Mitigating evidence must be considered and weighed when contained **anywhere** on the record, to the extent that it is believable and uncontroverted. This dictate applies with no less force when the defendant argues in favor of the death penalty, even when the defendant asks the trial court not to consider mitigating evidence. The experts informed the trial court that further testing and evaluation was required to fully understand Ocha's mental condition as it relates to possible statutory mental mitigation.

Appellant also contends that the State failed to prove the heinous, atrocious and cruel (HAC) aggravating circumstances beyond a reasonable doubt. The State's evidence did not prove beyond a reasonable doubt that the murder was heinous, atrocious and cruel.

Finally, this Court should recede from Hamblen v. State, 527 So.2d 800 (Fla. 1988). The trial court allowed Robinson to waive the presentation of mitigating evidence. Hamblen approves such a process. The trial court need not appoint special counsel to present evidence and argument for a life sentence. The requirements placed on the trial court and this Court to examine the mitigation in order to ensure the fair application of death sentences is inconsistent with the

Hamblen holding. If mitigating evidence is not presented, the trial court and this Court cannot discharge their duties to review the propriety of the death sentence.

POINT I

THE COURT ERRED IN NOT INVESTIGATING THE POSSIBILTY OF STATUTORY MENTAL MITIGATION IN VIOLATION OF THE APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The appellant entered a written plea of guilty to first degree murder. (I 91) The state had made no plea offer and disclosed that they would be seeking the death penalty. (I 91) The appellant filed a written affidavit whereby the appellant has instructed his attorney Kenneth J. Komara not to present any mitigation evidence on his behalf. (I 93) The wishes of the appellant were ignored.

Mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So.2d 160 (Fla.1991); Campbell v. State, 571 So.2d 415 (Fla.1990); Rogers v. State, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Moreover, 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 (Fla.1993):

> [1] Counsel 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 penalty phase evidence.

Koon at 250; Durocher v. State, 604 So.2d 810, 812 n. 3 (Fla.1992),cert. denied, 507 U.S. 1010, 113 S.Ct. 1660, 123 L.Ed.2d 279 (1993). In the end, the trial judge must carefully analyze all the possible statutory and nonstatutory mitigating factors against the established aggravators to ensure that death is appropriate. Pettit v. State, 591 So.2d 618, 620 (Fla.),cert. denied, 506 U.S. 836, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992); Hamblen v. State, 527 So.2d 800, 804 (Fla.1988). The judge must not "merely rubber-stamp the state's position." Hamblen, 527 So.2d at 804.

The court, following the procedure outlined in Koon v. Dugger, 619 So.2d 246 (Fla. 1993), had defense counsel tell it what mitigation he believed could be established. The parties stipulated that the testimony from Dr. Berns, Dr. Tressler, and Dr. Berland be made part of the sentencing hearing and be considered as possible mental mitigation in this case. (III 406)

Dr. Berland provided evidence that the appellant has a history of suicidal thinking. (III 412) The appellant's history of suicidal thinking dates back to August of 1978. (III 412) While being confronted by police in 1978, appellant stated all he wanted to do is die; and when apprehended exclaimed "shoot me, I want to die." (III 413) Once in jail, the appellant removed his jacket and tied it to

the bars and hung himself. (III 413)

The appellant had two sever head injuries as a child at age five. (III 416) The appellant fell down a big flight of stairs and was in a coma for two weeks, then he was blind for three days and had to learn to walk and talk after the fall. (III 416) The appellant also showed symptoms of a lesion or a tumor in his brain. (III 416) The appellant had complained of having decreased peripheral vision, difficulty with his balance at times and **it was recommended by Dr. Berns that he undergo a full neuro psychiatric evaluation to rule out the possibly of a tumor**. (Emphasis added) (III 417)

The appellant suffers from a psychotic disturbance. (III 430) The results of appellant's M.M.P.I. test demonstrated that the appellant was someone who attempted to deny mental health problems and his score demonstrated a personality that is associated with delusional paranoid thinking which is part of a psychotic disturbance. (III 430) In spite of the appellant's efforts to minimize his mental health problems or suppress mental illness, the appellant had a psychotic profile with scale six, the paranoia scale, the highest score reflected in delusional paranoid thinking way outside the normal range. (R 431) The appellant also had a scale eight on the schizophrenia scale which measures a broad range of psychotic symptoms. (III 431) The appellant's score on the F scale indicated a psychotic disturbance that is chronic or long lasting in nature. (III 431) The appellant also

scored a sub-scale of eight on the schizophrenia scale which is a measure of hallucinations. (III 431) A score of four more on that scale would indicate hallucinations with high reliably. (III 431) **Dr. Berland would have sought more elaborate verification of appellant's psychotic symptoms had he been able to conduct the evaluation fully**. (Emphasis Added) (III 433)

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 of appellant which according to this Court's opinion in Muhammad v. State, 26 Fla. L. Weekly S224 (Fla. April 5, 2001), was error. In Muhammad this Court said the trial judge had some discretion in whether to call an expert or not.

> Further, 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. This precise procedure has been suggested by the New Jersey Supreme Court in State v. Koedatich, 112 N.J. 225, 548 A.2d 939, 992 (1988), and recognized as appropriate by the Georgia Supreme Court in Morrison v. State, 258 Ga.

> 683, 373 S.E.2d 506, 509 (1988). If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint 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.

Muhammad at 238. The counsel for appellant submits that the trial court abused its discretion in not ordering the testing and evaluation that experts Dr. Berns and Dr. Berland both stated were needed to better understand appellant's mental condition.[2]

This Court is constitutionally required "to 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). This case provides a perfect example of why the defendant's failure to present mitigating evidence makes it 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. Appellant appears to have suffered from an extremely difficult childhood. Appellant left home at a very early age to escape the cruelty of his mother. Appellant's sisters also suffered from varied mental disorders and have been periodically

[2] Counsel is in the unusual circumstance of making arguments against the direction of his client.

institutionalized. In addition, it appears that Ocha has a history of serious psychological problems starting back with several suicide attempts dating back from 1978. The limited testing that was performed demonstrated that appellant attempts to minimize his mental health problems or suppress mental illness; suffers from delusional paranoid thinking way outside the normal range; and likely suffers from schizophrenic hallucinations.

Since the appellant was a death volunteer that waived the presentation of mitigation evidence and directed his counsel not to present mitigation evidence, statutory mental mitigation was not fully developed in this case. When the experts alerted the court to the need of further testing and evaluation, the trial court should have issued an order for them to provide this Court with a meaningful understanding of the appellant's mental condition. The trial judge failed to do so, therefore this Court should reverse the trial court's sentence and remand for a new sentencing hearing.

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.

In the sentencing memorandum, the defense counsel objected to the "heinousness" (HAC) aggravating factor contending that the evidence did not support it. (I 130) The trial court nonetheless found that the HAC aggravating factor applied. (II 253)

In finding this particular aggravating factor, the trial court cited appellant's confession that the strangulation of Carol Skjerva began while she was conscious. (II 253) The trial court further cited the medical examiner's testimony that the victim lost consciousness from 30 seconds to 4 minutes. (II 252) The trial court concluded based upon Tompkins v. State, 502 So.2d 415 (Fla. 1986) 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. Tompkins at 412.

Any murder could be characterized as heinous, atrocious, or cruel. However, to avoid such an over broad and unconstitutional application of HAC, restrictions have been placed on this aggravating factor. It is well-settled that the

aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering. Bonifay v. State, 626 So.2d 1310, 1313 (Fla. 1993). Also, any "instantaneous or near instantaneous death" does not qualify as HAC. Donaldson v. State, 722 So.2d 177, 186 (Fla. 1998).

The State has the burden of proving aggravating circumstances beyond a reasonable doubt. Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993). Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the state has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) However, more recently, this Court has stated that it is not within its function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt. "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." Willacy v. State, 696 So.2d 693, 695 (Fla. 1997)(footnote omitted). See also, Way v. State, 760 So.2d 903, 918(Fla. 2000).

In this Court's application of this factor, it has required HAC murders to have been torturous, not simply physically so, but mentally as well. Wickham v. State, 593 So.2d 191, 193 (Fla. 1991); Richardson v. State, 604 So.2d 1109 (Fla.

1992). Thus, where a defendant shot a victim causing instant death, this aggravator may have applied because preceding the painless death was a prolonged or significant period where the victim was aware of his impending death. See, e.g., Cooper v. State, 492 So.2d 1059 (Fla. 1986) (victim bound and helpless, gun misfired three times); Preston v. State, 607 So.2d 404 (Fla 1992) (fear and strain can justify HAC). On the other hand, quick deaths, in which the victim had no awareness they were about to be killed, or that they knew for only a short time, do not become especially heinous, atrocious, or cruel, even where the victim was stabbed. See e.g., Wickham v. State, 593 So.2d 191 (Fla. 1991)(Ambushing a "Good Samaritan" and shooting him twice was not HAC even though he pled for his life); Scull v. State, 533 So.2d 1137 (Fla. 1988)(A single blow to the head does not support HAC).

This Court has consistently upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed. See Derrick v. State, 641 So.2d 378, 381 (Fla.1994); Floyd v. State, 569 So.2d 1225, 1232 (Fla.1990); Haliburton v. State, 561 So.2d 248, 252 (Fla.1990); Nibert v. State, 508 So.2d 1, 4 (Fla.1987); Johnston v. State, 497 So.2d 863, 871 (Fla.1986). This was also the circumstance in many of the cases where the "fear and emotional strain preceding [the] victim's almost instantaneous death" was considered as contributing to the

heinous nature of the murder. Adams v. State, 412 So.2d 850,857 (Fla. 1982) (finding that victim's murder by strangulation was HAC and noting that this Court has found this method of homicide to be HAC); see also Hitchcock v. State, 578 So.2d 685, 693 (Fla.1990) (upholding HAC aggravator and stating that strangulations are nearly per se heinous).

It is uncontroverted that the cause of death was by strangulation. There was little physical confrontation between Ocha and Skjerva immediately prior to the murder. Once Ocha had physical control, he strangled Skjerva with a cloth tie. The entire incident consumed only at most a few minutes. It was clear from Ocha's statement to police that he wished that Skjerva would die quickly and without suffering:

> The appellant tightened the rope again and needed to kill the women so that she did not end up as a vegetable. (S 2) The appellant did not want it to take that long, but the women would not die. (S 2)

The appellant did not intend the victim to live the 30 seconds to four minutes suggested by Dr. Gore. In Teffeteller v. State, 439 So.2d 840, 841 (Fla. 1983), the victim lived for a couple of hours after a shotgun blast to his chest. Despite the fact that the victim was in "undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been", this Court concluded that the trial

court improperly found HAC.

If we approved the application of the HAC aggravating factor in the instant case without some factual proof of the victims' mental torture, then the factor would apply in every instance where a normal person might feel fear. This would exclude only those homicides where the victim was ambushed or killed without awareness of the assailant. This clearly would go far beyond finding the HAC factor to be "appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " Richardson, 604 So.2d at 1109 (quoting Sochor v. Florida, 504 U.S. 527, 536, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992)). Such a broad interpretation of the HAC aggravating factor would render it unconstitutional because it would not provide the sentencer with adequate guidance. See Sochor, 504 U.S. at 536, 112 S.Ct. 2114. Accordingly, the HAC factor is not permissible based on the present facts, and the trial court's finding of this factor was error requiring the appellant's death sentence vacated and the appellant sentenced to life imprisonment.

POINT III

THIS COURT SHOULD RECEDE FROM HAMBLEN.

This is another case where a capital defendant manipulates the criminal justice system in an attempt to commit suicide. Although this Court has repeatedly declined to recede from Hamblen v. State, 527 So.2d 800 (Fla. 1988), the argument is again presented here for the Court's reconsideration. This is especially true in light of the fact that, if this Court declines to reduce Ocha's sentence to life imprisonment, this Court must reverse for a new penalty phase based on the error set forth in Point I. When this Court does reverse this case, we all will be in a similar situation in another year or so, **unless this Court recedes from Hamblen**.

This Court has addressed issues surrounding a situation where a capital defendant desires that nothing be presented to mitigate his sentence and held that a competent defendant in a capital case can refuse to contest the imposition of a death sentence and waive the presentation of evidence in mitigation. In Hamblen, the defendant waived counsel and pled guilty to first-degree murder. He also waived a jury sentencing recommendation; presented no evidence in mitigation and challenged none of the aggravating evidence. On appeal, the question was whether the trial court erred in allowing Hamblen to represent himself at the penalty phase.

Appellate counsel argued that the court should have appointed special counsel to present and argue mitigation. This Court rejected his argument:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)]. In the field of criminal law, there is no doubt that `death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.

Id. at 804. This Court also found that the judge in Hamblen had protected society's interest in insuring that the death sentence was not improperly imposed since he carefully analyzed the propriety of the aggravating circumstances and the possible statutory and nonstatutory mitigating evidence. Id. The opinion concluded:

> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

Id.

Later, in Anderson v. State, 574 So.2d 87 (Fla. 1991), the defendant directed his lawyer not to present any evidence at the penalty phase of his trial. Counsel

told the judge what he would have presented in mitigation had his client not directed him to do otherwise. On appeal, counsel argued that Anderson's orders to his lawyer denied him his Sixth Amendment right to the effective assistance of counsel. He also argued the court had not determined if Anderson had freely and voluntarily waived his constitutional right to present mitigating evidence. This Court rejected both arguments, finding that Anderson's comments on the record were sufficient to waive mitigating evidence and because he had counsel, no Faretta inquiry was required. Id. at 95.

In Pettit v. State, 591 So.2d 618 (Fla. 1992), this Court adhered to the rule announced in Hamblen that a competent defendant could waive the presentation of mitigating evidence. This Court affirmed the trial court's decision to allow the defendant to waive the presentation of mitigating evidence and the subsequent sentence of death. However, this Court reiterated the responsibility of the trial judge to analyze the possible statutory and nonstatutory mitigating factors. The trial judge satisfied the requirement in Pettit when he heard the testimony of the two neurologists who had examined Pettit. Pettit, at 620.

Although Hamblen, Pettit and Anderson said that a capital defendant who wants to die can exercise control over his destiny at the trial phase -- waive counsel, plead guilty, waive the presentation of all mitigating evidence -- this same control

does not extend to the appeal stage. This Court's opinion in Klokoc v. State, 589 So.2d 219 (Fla. 1991) establishes this limit on the defendant's ability to control capital sentencing. In that case, the court accepted the defendant's plea of guilty to first-degree murder, and as in Anderson, the defendant refused to permit his lawyer to participate in the penalty phase of the trial. Counsel asked to withdraw, but the court denied the request. Then, contrary to this Court's holding in Hamblen, the trial judge appointed special counsel to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." Klokoc at 220. Special counsel presented mitigation. This type of procedure would also have been necessary had the trial court chosen to exercise its discretion to obtain a jury recommendation before sentencing. See State v. Carr, 336 So.2d 358 (Fla. 1976). Following his client's wishes, appellate counsel asked this Court to allow him to withdraw and to dismiss the appeal. This Court denied that request, saying:

> ...counsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence. Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.

Klokoc at 221-222. The result of the appeal was a reversal of Klokoc's death sentence as disproportional.

This Court has consistently adhered to its decision in Hamblen, that defendants who want to die have the right to control the extent of mitigating evidence available to the sentencer. Lockhart v. State, 655 So.2d 69 (Fla. 1995); Henry v. State, 613 So.2d 429, 433 (Fla. 1992); Clark v. State, 613 So.2d 412, 413 (Fla. 1992). In Klokoc v. State, 589 So.2d 219 (Fla. 1991), this Court apparently approved the trial court's appointment of "special counsel" to represent the "public interest" in bringing forth mitigating factors to be considered by the court in the sentencing proceeding. Appellate review in Klokoc was thus facilitated and resulted in this Court vacating Klokoc's death sentence.

However, this Court has since held that a trial court need not appoint independent counsel for this purpose where a defendant wants to limit the mitigating evidence. See, e.g., Lockhart v. State, 655 So.2d 69, 74 (Fla. 1995). Nevertheless, this Court has acknowledged:

> ...that this is a troubling area of the law. On a case-by-case basis, we have attempted to achieve a solution that both honors the defendant's right of self-determination and the constitutional requirement that death be imposed reliably and proportionally.

Farr v. State, 656 So.2d 448 (Fla. 1995).

In Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993), this Court announced a prospective rule.

> Although we find no error occurred here, we are concerned with the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence. Accordingly, we establish the following prospective rule to be applied in such a situation. When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel 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.

The parties below were cognizant of this Court's pronouncement in Koon. It is not at all clear how thorough or zealous defense counsel pursued the investigation of potential mitigation in the case at bar. In Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), defense counsel was found to be ineffective because, at his client's command, he ceased investigation of mitigating circumstances. Appellant submits that such a conclusion is not so clear in Ocha's case. Indeed, Ocha's record has

some of the earmarks that indicate that counsel "latched onto" the Appellant's instruction and failed to investigate penalty phase matters. Koon v. Dugger, 619 So.2d at 250. For example, Dr. Berland admitted to the trial court that he had not spent any time with Appellant in preparation of his testimony.[3]

It is clear in this case that Glen James Ocha wants to be executed by the State of Florida. Undersigned counsel is the lone voice of protest in the entire process. As a result of the constitutionally mandated automatic review conducted by this Court of all death sentences, undersigned counsel must attempt to argue against the propriety of Ocha's sentence of death. Klokoc v. State, 589 So.2d 219, 221-22 (Fla. 1991). If this direct appeal fails, Ocha can waive any further post-conviction proceedings and engage in state-assisted suicide. See, e.g., Durocher v. Singletary, 623 So.2d 482 (Fla. 1993). Appellant has a history of suicide attempts and is now using the State to do ti hin what he could not do successfully for himself.

In this type of situation, defense counsel finds the arguments to be sparse. Due to this Court's inconsistent application of the law in this area, undersigned

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[3] The trial court asked the relevance of Appellant's reported statement "And while pencils are available to him for his use, Ocha says he doesn't draw presently, I'm not worthy of my gift." (III 434) Dr. Berland replied "Well, of course, I'm guessing, since I haven't spent any time with him." (III 434)

counsel is the only person that must argue in favor of a life sentence. Ocha need not and did not. He requested death. Undersigned counsel finds himself in an odd predicament. There is little basis in the record to argue for life, yet I am required to so argue by law. Klokoc v. State, 589 So.2d 219 (Fla. 1991). This is not the way it should work.

Capital defendants should not be allowed to thwart review of their cases. Hamblen and its progeny, allow a capital defendant to thwart the adversarial system at the trial court level. These holdings are inconsistent with this Court's requirement in Klokoc that the adversarial system be preserved on appeal. This Court's review of a death sentence, where the facts were not developed below, fails to protect our jurisprudence from the unfair application of this ultimate sanction. The way the procedure works now, counsel is reminded of an anonymous quote. "Prejudice is a great time saver. It allows you to form an opinion without getting the facts."

Procedures must be in place to prevent miscarriages of justice. The trial judge and this Court have the duty under the Eighth and Fourteenth Amendments to examine the record for mitigating facts and to consider those facts in reaching a decision concerning the proper sentence. Parker v. Dugger, 498 U.S. 308 (1991). This constitutional mandate fails when procedures are not in place to ensure that pertinent facts are presented in the record. In the interest of fair application and

appellate review of capital sentences, this Court must recede from Hamblen and Koon. Ocha's case should be reversed for a new penalty phase where mitigation evidence can be fully developed to insure the constitutional application of the capital sentencing. Amends. V, VIII and XIV, U.S. Const.; Art. I, §§ 9, 16 and 17, Fla. Const.

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Glen James Ocha, #911117, Florida State Prison, P.O. Box 181, Starke, FL 32091, this 8th day of August, 2001.

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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.

_____
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER