

IN THE SUPREME COURT OF FLORIDA

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JOHNNY HOSKINS,  
a/k/a JAMIL ALE,

APPELLANT, CROSS-APPELLEE,

v.

CASE NO. 84,737

STATE OF FLORIDA,

APPELLEE, CROSS-APPELLANT

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

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

KENNETH S. NUNNELLEY  
ASSISTANT ATTORNEY GENERAL  
FLA BAR # 098818  
444 SEABREEZE BLVD. 5TH FL.  
DAYTONA BEACH, FL 32118  
(904) 238-4990

COUNSEL FOR APPELLEE

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REPLY BRIEF OF CROSS-APPELLANT

STATEMENT OF THE CASE AND FACTS

The cross-appellant State of Florida relies on the facts set out in the State's opening brief, and upon such facts as are set out with particularity in the argument section of the State's reply brief. The State does not accept the facts set out in Hoskins' brief in connection with the issue contained in the State's cross-appeal.

SUMMARY OF THE ARGUMENT

The sentencing court erroneously refused to apply the cold, calculated and premeditated aggravating circumstance to this murder. That aggravator is proven beyond a reasonable doubt by the evidence, which establishes that all elements of the CCP aggravator exist.

## ARGUMENT

### IN REPLY TO **HOSKINS'** ARGUMENT THAT THE MURDER WAS NOT COLD, CALCULATED AND PREMEDITATED

In his answer brief to the State's Cross-Appeal, **Hoskins** sets out a lengthy discussion of the components of the cold, calculated and premeditated aggravating circumstance.<sup>1</sup> To the extent that the discussion of those elements is based on this Court's **Jackson** decision, the State does not dispute that **Jackson** defines the CCP aggravating circumstance. However, **Hoskins'** argument collapses on itself when the evidence supporting the application of the CCP aggravator in this case is considered in light of the settled definition contained in **Jackson**. While **Hoskins** tries to make application of the CCP aggravator the product of nothing but speculation, that is simply not true.<sup>2</sup>

As set out in the State's opening brief, the victim, Dorothy Berger, lived next door to **Hoskins**. Presumably, Ms. Berger knew **Hoskins**, at least on sight. Although the ability of Ms. Berger to

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<sup>1</sup>Only the existence of the heightened premeditation element is challenged by **Hoskins**--as set out in the State's opening brief, the other elements exist beyond a reasonable doubt. The State relies upon the argument set out in that brief as to the existence of the remaining CCP elements.

<sup>2</sup>While **Hoskins** repeatedly claims that the State is doing nothing but speculating and arguing "could have **beens**", a dispassionate review of the evidence rebuts that claim.

identify her attacker is not conclusively shown by the evidence, that is the only bit of evidence supporting the CCP aggravator about which **Hoskins** can say that. The evidence, which **Hoskins** challenges by ignoring, establishes that Ms. Berger received a number of blows to her head, which were inflicted with some sort of instrument. (TR976; 978) Those injuries would have bled heavily, yet only a very small amount of blood was found on Ms. Berger's bed sheet. (TR1217-19; 1278-84)<sup>3</sup> However, a large pool of blood was found in the trunk of Ms. Berger's car, where **Hoskins** placed her when he left the victim's house on his way to Georgia. (TR1220-21) The post-mortem examination of Ms. Berger's body identified numerous defensive wounds, and at least thirteen separate blows to her head and face, none of which was sufficient to kill her. (TR1309-10) **Hoskins** inflicted all of those injuries before he strangled Ms. Berger. (TR1300; 1304)

In his brief, **Hoskins** makes much of the fact that the prosecutor stated, during argument to the jury, that he could not tell the jury "where or when the victim was killed." From that statement, **Hoskins** constructs his argument that the State's

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<sup>3</sup>No blood was found in any other location in the victim's house, nor was any blood found outside of the house. (TR1220-21). The blood on the sheet was consistent with vaginal bleeding as a result of forcible sexual intercourse.

argument for application of the CCP aggravator is based on nothing but speculation. In actuality, the facts of this crime, as shown by the unchallenged physical evidence, establish that this murder was cold, calculated and premeditated under the prior decisions of this Court.

The virtual absence of blood inside Ms. Berger's home establishes that most of her injuries, many of which would have bled profusely, were inflicted somewhere else. The fact that all of her multiple injuries were inflicted before she was strangled establishes that **Hoskins** took her to another location and killed her.<sup>4</sup> Likewise, the fact that Ms. Berger was bound and gagged shows that she was alive when that was done--had she not been alive (and conscious), there would have been no need to restrain her. However, regardless of whether **Hoskins** restrained Ms. Berger before she was placed in the trunk of her car or later, that supports the heightened premeditation component of the CCP aggravator because that was done for no purpose other than restraining the victim until **Hoskins** could kill her, In light of the fact that the victim was kidnapped (and concealed in a car trunk), and considering the

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<sup>4</sup>No blood at all was found outside of the home--it is not possible, under the evidence, for Ms. Berger to have been killed "immediately outside of the house".

length of time and the number of injuries sustained by the victim, this was obviously not a spur of the moment killing. See, e.g., *Lockhart v. State*, 655 So.2d 69, 73 (Fla. 1995) ("It is evident that this killing was not something that occurred on the spur of the moment. The fact that Colhouer was bound and tortured before she was killed indicates that the incident happened over a period of time. The nature and complexity of the injuries indicate that Lockhart intended to do exactly what he did at the time he entered Colhouer's house. Thus, the trial court did not err in finding CCP."); *see also, Foster v. State*, 654 So.2d 112, 115 (Fla. 1995) ('The fact that Foster had ample time to reflect on his actions and their attendant consequences, after concealing Lanier's body and before cutting Lanier's spine, is compelling evidence of the heightened level of premeditation required to establish the cold, calculated, and premeditated aggravator.") ; *Suggs v. State*, 644 So.2d 64, 70 (Fla. 1994) ("The entire criminal episode reflects the Defendant's careful plan to rob [the victim], kidnap her, kill her, and hide her body, all with the aim of avoiding detection.") *Lockhart, Foster* and *Suggs* are essentially indistinguishable on the facts from the murder committed by *Hoskins*. If the murders in those cases were cold, calculated and premeditated, and that is the law, then that aggravator applies to this murder, as well. See



also, *Foster (Jermaine) v. State, No. 84,228, ms. op.* at 5 (Fla., July 18, 1996), and cases cited therein.

Just as this was not a spur of the moment killing, it was not a killing in a "rage or frenzy," either. Ms. Berger had so many separate injuries that it would take a minimum of fifteen to twenty minutes to inflict all of them. (TR1310) Moreover, **Hoskins** did not inflict the various injuries in one continuous transaction, because only a small amount of blood was present inside the house. To accept **Hoskins'** theory (which finds no support in the evidence) that this murder was the result of panic, rage or frenzy would require this Court to hold that **Hoskins** acted under the effect of those emotions over a period of hours. That result, at least under the facts of this case, is wrong. There is no question but that **Hoskins** burglarized Ms. **Berger's** home; raped her; bound and gagged her; put her in the trunk of her car and fled the scene; beat her severely; strangled her; and buried her body in Georgia. Under any view of the evidence, this crime consumed a substantial amount of time, during which **Hoskins** had more than enough time to reflect on and consider his actions and their consequences. See, *Foster, supra; Suggs, supra.*

In his brief, **Hoskins** attempts to support his position by relying on the generalized testimony of his mental health expert.

That testimony does not help him because the portion of that testimony set out in **Hoskins'** brief (and which he claims supports his position) is general in nature, and does not reflect the witness's opinions about **Hoskins'** mental state. When he testified specifically about **Hoskins'** mental state, the expert witness was not of the opinion that **Hoskins** is impulsive. (TR1567) That expert testified unequivocally that the facts of this crime are the behavior of a criminal who does not want to be caught. (TR1575) That expert also testified that whatever frontal lobe brain damage **Hoskins** may have had nothing at all to do with his behavior in committing this crime. (TR1576). The testimony of the mental state expert that addressed and considered the specific facts of this crime, and the mental state implications of those facts, is very specific in its rejection of any factor that cuts against the cold, calculated and premeditated nature of this murder. The facts, and the testimony of **Hoskins'** own expert, support a finding that this murder was cold, calculated and **premeditated**.<sup>5</sup>

In contrast to the highly specific testimony which supports finding the CCP aggravator, **Hoskins'** arguments in his brief are

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<sup>5</sup>**Hoskins'** claim that the rape was not "preplanned" misses the point--the existence of the CCP aggravator has nothing to do with the occurrence of the rape, anyway.

based on generalizations by his expert that are in no way linked in his testimony to the facts of this case.<sup>6</sup> Contrary to Hoskins' claims, it requires no speculation at all to find that the CCP aggravator applies to this killing--the evidence establishes it beyond a reasonable doubt. This Court should hold that the CCP aggravating circumstance applies to this murder because all of the required components are well-established.

To the extent that the **Presentence** Investigation suggests that Ms. Berger stopped "kicking and moaning in the trunk of the vehicle" somewhere around Kissimmee, Florida, that assertion is inconsistent with all of the physical evidence from trial. As set out in the PSI, Ms. Berger died of manual strangulation, which fractured her larynx on both **sides**.<sup>7</sup> Ms. Berger cannot have just stopped kicking and moaning--she died when **Hoskins** knelt on her chest and strangled her. Moreover, the PSI states that all of the injuries were inflicted before **Hoskins** took Ms. Berger from her home. As set out above, that cannot be so because no significant

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<sup>6</sup>The generalized testimony concerned the general behavior of sex battery defendants and persons with "**frontal** lobe damage". The witness specifically said that **Hoskins** does not exhibit those behaviors. In other words, **Hoskins** is relying on "profile testimony" that does not reflect his true mental state.

<sup>7</sup>**There** is no suggestion that any period of time elapsed between the time the strangulation ended and Ms. Berger died.

amount of blood was found inside the home. Apparently those parts of the PSI came from **Hoskins'** statement--they find no support in the evidence, and are an insufficient basis for not applying the CCP aggravator to this murder.<sup>8</sup>

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<sup>8</sup>No criticism of the PSI is intended, nor should such be inferred.

**CONCLUSION**

Wherefore, based upon the foregoing arguments and authorities, this Court should hold that the cold, calculated and premeditated aggravating circumstances applies in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

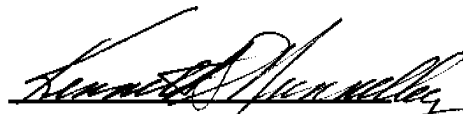


KENNETH S. MUNNELLEY  
ASSISTANT ATTORNEY GENERAL  
FLA. BAR # 098818  
444 SEABREEZE BLVD. 5TH FL.  
DAYTONA BEACH, FL 32118  
(904) 238-4990

COUNSEL FOR APPELLEE

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above, and foregoing has been sent to Mr. James R. Wulchak, Chief, Appellate division, Assistant Public Defender, 112 Orange Ave., STE A, Daytona Beach, FL 32114 this the 19<sup>th</sup> day of July, 1996.



Kenneth S. Munnelle  
Of Counsel