IN THE SUPREME COURT OF FLORIDA

JOHNNY HOSKINS,)
n/k/a JAMIL ALLE,)
)
Appellant,)
)
vs.) CASE NO. 84,737
)
STATE OF FLORIDA,)
)
Appellee.)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT
ANSWER BRIEF OF CROSS-APPELLEE

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JOHNNY HOSKINS, n/k/a JAMIL ALLE, Appellant,	)	
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KEPLY BRIEF OF APPELLANT
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STATEMENT OF THE CASE AND FACTS

The appellant relies on the Statement of Case and Statement of Facts contained in his Initial Brief as an accurate, complete statement of the relevant facts in this case. Specifically, the appellant disputes the following items in the state's version of the case and facts:

The state claims that the police were dispatched to the victim's house on the same night, Saturday, October 17, 1992, that she last contacted anyone. (Appellee's brief, p. 3) That does not appear to be the case. While the prosecutor questioned one of the respond-

ing officers concerning the date of October 17th, this was an error. An accurate reading of the record is that the police were not called to the scene until Sunday night, October 18, 1992. (T 1148-1149, 1190)

The state claims at page 7 of its answer brief that "The semen found at the residence and as a result of the sexual assault examination performed on the victim came **from** Hoskins." (emphasis added) However, this was **not** the testimony from the witness, since DNA comparisons are not an exact science as is the case with fingerprint comparison; an accurate quotation of the expert's testimony was, "that the semen **could have come** from Johnny Hoskins." (T 1444) (emphasis added) As agreed by the expert, "it cannot be stated in terms of absolutes whether in fact it was Mr. Hoskins, only that it's possible that it could be," (T 1504)

The appellant rejects in its entirety the state's version of Dr. Krop's testimony as inaccurate and misleading. The state claims that Dr. Krop testified that Hoskins was not mentally retarded. (Appellee's brief, p. 10) This is a correct statement as far as it went, but is entirely misleading since Dr. Krop testified that Hoskins was tested as having an I.Q. of 71, which is a mere two points above retarded, and would place him in the borderline intellectual ability, which would be in the lower three to four percent of the entire population of the United States. (R 1555-1556) The state also contends erroneously that Dr. Krop's "findings of neurological impairment were 'marginal'." (Appellee's brief, p. 10) This portion of Dr. Krop's testimony was referring solely to tests conducted by Dr. Weiss to determine left temporal lobe function, which the doctor found to be marginal or borderline (although Hoskins does have some memory deficits). (T 1547) The doctor in the very next paragraph (which the

state conveniently omitted from its "facts"), opined that other testing revealed "significant findings" to a "very severe level" of abnormality to Hoskins' frontal lobe, which portion of the brain controls the "start/stop" mechanism of our behavior. (R 1547-1553) This damage to the brain could cause a person to go into a rage or frenzy, not being able to control himself, which, Dr. Krop opined, could be related to the instant crime. (R 1551-1553)

The state next maintains that Dr. Krop "also testified that he cannot say what effect any brain damage Hoskins may have has [sic] on his behavior. (TR 1565)" This is false. Again, the state has taken Dr. Krop's testimony concerning one particular test given (in this instance an EEG, which measures electrical activity in the brain to reflect on any type of epileptic problem), and erroneously says it applies to **"any** brain damage." (R 1546-1547, 1565) While Dr. Krop could not say what effect the mild abnormality found in the test results of the EEG (solely to determine epilepsy) may have had on Hoskins, he clearly indicates that this one test result is not the end of the inquiry, since, "you administer several different tests because they measure different things+" (R 1546-1547) As related in the Statement of Facts in the Initial Brief, when speaking of the particular tests showing brain damage to the frontal lobe, which was present in Hoskins, the doctor strongly opined that this damage controls the stop/start mechanism of behavior, causing the person to have difficulty stopping behaviors once they are begun. (R 1549- 155 1) This would indeed apply to violent behavior; the neuropsychologist describing it as a "rage reaction," causing the person to go way beyond what is necessary in terms of the violent acts, or into a frenzy. (R 155 1-1552) It is an explosive kind of behavior, where the person feels as if he cannot control himself. (R 1552) This diagnosis is consistent with the type of violent behavior present in the instant case, where

the individual had difficulties controlling his impulses once they got started. (R 1553) Based on the testing and data available to Doctor Krop,[1] he was unable to specifically apply these deficits to the defendant with any certainty; the doctor could only say that individuals who have the kind of test performance that Mr. Hoskins had often show this type of impairment and this type of behavior pattern. (R 1567-1568)

While the state is correct in its statement that frontal lobe damage does not relate to planned behavior (Appellee's brief, p. 10), Doctor Krop reported that, in his professional opinion (based on twenty years of treating sexual offenders and helping develop the North Florida Evaluation and Treatment Center in Gainesville), this type of crime is generally not preplanned, but rather a crime of impulse (which is affected by the type of damage to the frontal lobe from which the defendant suffered). (R 1551-1553, 1573-1575) Additionally, the doctor stated that the types of activities of binding, gagging, and disposing of the body, in no way relate to preplanned activity prior to the commission of a crime, but instead relate only to post-crime activity; thus, it does not reflect a person's planning ability. (R 1574-1575) The doctor never stated, as maintained by the state's brief, that "**Hoskins' behavior** in committing this crime is in no way related to the frontal lobe brain damage that may be present." (Appellee's brief, p. 10) Rather, the doctor merely opined that **planned behavior** does not relate to frontal lobe damage (again remembering that the doctor did **not** find the facts of this crime to be evidence of any preplanning on the defendant's part). (R

[1] See argument contained in Point II of Initial Brief of Appellant and in this reply brief concerning the sufficiency of the test results available to Dr. Krop, and the need for the further testing requested by the defense.

1575-1576)

Lastly, the state claims, based upon the testimony of Karen Palladino, a Ph.D. employed by Brevard County Schools, that "the fluctuation in sub-test scores observed in intelligence tests administered to Hoskins while he was in school was the result of cultural deprivation rather than mental retardation." (Appellee's brief, pp. 10-11) Ms. Palladino said nothing of the sort. On the pages quoted by the state, Ms. Palladino was merely stating that studies have shown that minorities have sometimes been classified lower in intelligence based on racial bias built into the standardized tests. One must look to fluctuations in tests scores and achievement scores to determine whether the student's intelligence level was minimized due to cultural deprivation (something that she did not testify she found in the defendant's case), rather than being an accurate determination of his intelligence level . (R 1600-1601, 1604-1605) Other than opining that the defendant did not fit into the mentally retarded range (which fact was already established by defense evidence), Ms. Palladino did not apply any of this general information about cultural deprivation to the defendant, as claimed by the state. She specifically stated that she did not know "whether, in fact, that [cultural deprivation] is what is reflected in the reports that [she has] reviewed." (R 1610) Additionally, in order to make an accurate assessment of the defendant's learning and intelligence level, she would need more information than she had available, including an interview with Hoskins and his family, and information on his family background. (R 1608-1609)[2] She therefore did not testify to

[2] The state's version of facts totally fails to even mention testimony from the school counselor who had actually worked with Hoskins at the time of the evaluation and testing which resulted in him being placed in the retarded class and who had such further information

(continued.. .)

much of anything specific which she could relate to Hoskins' case. Furthermore, the state's claim that Ms. Palladino indicated that the defendant's records do not indicate impulsivity is not supported by the testimony. She simply stated that there was a comment in the defendant's psychological report noting a short attention span, disturbing other children, and showing immature academic behavior, adding, "I don't know if that could be construed as what you're asking me." (R 1606-1607) On cross-examination, she admitted that Hoskins may indeed have had impulse control problems. (R 1610-1611) There was, she admitted, concerns from Hoskins' school years that he may have been suffering from organic brain damage. (R 1611)

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[2] (. . .continued)
available to her that Ms. Palladino said she was lacking. See Initial Brief of Appellant, pp. 12-13, for details of this testimony.

SUMMARY OF ARGUMENT

Point I. The trial court erred when it failed to strike the entire jury venire due to the clerk's unauthorized improper exercise of the trial judge's recusal power or, at least, by failing to allow a proffer on the issue so that the defendant could show such an improper exercise of power.

Point II. Neurological testing in a capital case, in order to assist the defense in rebutting aggravating circumstances presented by the prosecution and to assist in presenting mitigating circumstances, is constitutionally required for an indigent defendant where the defense has made the showing that such testing would be useful in the preparation of its defense. The court's denial of this testing renders the defendant's death sentence constitutionally infirm.

Point III. The court erred in making its findings of fact in support of the death sentence where the findings were insufficient, where the court failed to consider and give appropriate weight to valid, substantial mitigating circumstances, and where the court erroneously found an inappropriate aggravating circumstance. This constitutional error requires a reduction of the sentence to life.

Cross Appeal. The trial court did not abuse its discretion in finding that the state had failed to meet its burden of proving beyond a reasonable doubt that the murder was committed in a cold, calculated, and premeditated manner. The state's argument is based totally on speculation as to the sequence of events, something that the prosecutor at trial admitted that he could not show. Further, the only evidence presented regarding this issue

came from a defense mental health expert, who testified that in his opinion there is not enough evidence presented in this case to show heightened premeditation or careful, pre-arranged planning on the defendant's part, and that in the majority of sexual offenders he has treated, the rape is not pre-planned. Thus, the state has failed to prove this aggravator beyond a reasonable doubt .

ARGUMENT

POINT I.

APPELLANT WAS DEPRIVED OF HIS RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY DRAWN FROM A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY.

The state contends, without citing any authority, that it is somehow too late to contest the representation of the jury venire prior to individual jury selection in his case. Is counsel for the state contending that trial counsel must be psychic, to know ahead of time if the court clerk is going to excuse potential jurors from the jury panel? At any rate, Florida law provides that the challenge here was indeed timely. Rule 3.290, Florida Rules of Criminal Procedure, provides that a challenge to the entire jury panel is timely if made in writing prior to individual examination of the jury venire in the particular case. See also State v. Bethel, 268 So.2d 557 (Fla. 3d DCA 1972); State v. Silva, 259 So.2d 153 (Fla. 1972); Green State, 60 Fla. 22, 53 So. 610 (1910). The motion was filed and heard prior to individual examination of any jurors in this case. (T21; R 23 15-23 17)

Further, the state contends that the administrative order, coming from the chief judge of the circuit, meets the statute's requirement that the "presiding judge" excuse these potential jurors. The appellant submits that the term "presiding judge" in this particular statute, not including any definition of that phrase, must be given the common meaning, which would indicate the excusal must come from the judge "presiding" over his case, not some blanket ruling by the chief judge in an administrative order, when no judge then reviews the grounds provided by the potential juror to the court clerk.

By the court clerk's excusal of certain classes of people, without the presiding judge hearing the specific reasons for the excusal in each of the juror's cases, the defendant has been denied his right to a trial by a jury which is comprised of a fair cross-section of the community. In Bass v. State, 368 So.2d 447, 449 (Fla. 1st DCA 1979), the Court reaffirmed that the constitutional guaranty of a jury trial includes assurance that the jury be drawn from a fairly representative cross-section of the community. Quoting from Taylor v. Louisiana, 419 U.S. 522 at 530 (1975), a case in which the conviction was reversed because women as a group had been systematically excluded from jury service, the Court stated:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.

Here, the defendant timely objected to the procedure which allowed the court clerk to excuse potential jurors without review of those jurors by the presiding judge. This had the effect of denying him his right to a fair jury trial, The court's further refusal to allow a proffer of the court clerk deprives the appellant of due process and precludes effective appellate review of this issue. See Initial Brief of Appellant, pp. 17-18.

POINT II.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO TRANSPORT THE DEFENDANT FOR NEUROLOGICAL TESTING (WHICH TESTING WAS TO BE PAID FOR BY THE PUBLIC DEFENDER'S OFFICE), AND WHICH TESTING WOULD HAVE PROVIDED MORE ACCURATE AND COMPLETE DATA ABOUT THE DEFENDANT'S ORGANIC BRAIN DAMAGE, ENABLING THE DEFENSE PSYCHOLOGIST TO REBUT AGGRAVATING CIRCUMSTANCES AND ESTABLISH MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE VIOLATIVE OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 2, 9, 16, 17, AND 21 OF THE FLORIDA CONSTITUTION.

The state claims that the defense has somehow waived the right to argue that the denial of the requested test violated the defendant's rights to effective assistance of counsel and of his mental health expert (two out of the possible eight constitutional violations argued in the Initial Brief as a basis for reversal on this point). The state contends that such constitutional violations were not specifically argued below. (Appellee's brief, pp. 31-32) This is an astounding claim which should not be followed by this Court; the whole crux of the argument below was that the PET-Scan was needed to enable the mental health expert to make a better evaluation of the defendant's mental health status in order to enable the defense to argue the mental health mitigation. (SR 45-50, 76-77) If this is not an argument concerning the potential ineffectiveness of the mental health expert and defense counsel without that test, then appellant's counsel does not know what is.

The state takes an extremely myopic view of Ake v. Oklahoma, 470 U.S. 68

(1985), arguing simplistically that Ake is inapplicable since the Public Defender's Office was willing to pay for the requested neurological test. (Appellee's brief, p. 28) What the state has done is to totally ignore other aspects of the Equal Protection Clause mentioned in the Initial Brief, to-wit: equal standing with the resources of the prosecution and not only non-indigent, but also non-incarcerated defendants, and the due process ramifications detailed in Ake (the right to fundamental fairness, the right to present a defense, effective assistance of counsel and of experts, to confrontation and compulsory process, and the rights to access to courts and the prohibition of cruel and unusual punishment) which require a reliable sentencing process through which a defendant can produce relevant and adequate mitigating evidence and can rebut aggravating circumstances presented by the prosecution. Yet the state's brief fails to even consider these issues.

The state also neglects in its brief to address the three factors to be utilized in performing the balancing test enunciated by Ake and presented in the initial brief. (See Initial Brief of Appellant, 27-30.) The appellant submits that there was no response by the state because there can be no legitimate response to the Ake balancing test; under the facts of this case, the Ake criteria were met and the trial court should have ordered the additional neurological test.

The state merely attempts to minimize the requested test by repeatedly announcing that the PET-Scan is a medical test and Dr. Krop is a neuropsychologist, rather than an M.D. This is of no moment since mental health experts have always relied on neurological tests in making their evaluations. See State v. Sireci, 536 So.2d 231 (Fla. 1988), (where a psychiatrist was found ineffective for not seeking additional tests on a defendant who

may have had organic brain damage). While, as Dr. Krop admitted, he, not being a medical doctor, cannot order the test or perform it himself, he could utilize the test results of the PET-Scan to make a more definitive neuropsychological evaluation concerning Hoskins' organic brain damage and the effect it may have had on his actions concerning this crime:

> Q [by defense counsel]: Doctor Krop, are there neuropsychological diagnostic tools that you rely on in your practice in determining to a degree of [psychological] or scientific certainty of the presence of organic brain damage?
>
> A [by defense neuropsychologist, Dr. Harry Krop]: Yes.
>
> * * *
>
> Q. Very good. What diagnostic tools would those be?
>
> A. Whenever I do a neuropsychological evaluation for me to render a more definitive decision as to any degree of psychological certainty, I would also rely on either consulting or reviewing neurological findings which would include -- depending on the particular case, it would utilize neurological testing; that is, various neurological assessment procedures.
>
> Q. Would a PET Scan be included among those?
>
> A. In certain cases certainly the PET Scan which is one of the more sensitive neurological assessments. Whenever there is a question from other sources of possible brain damage a PET Scan would be indicated.
>
> * * *
>
> A PET Scan is when the neurologist injects a tluid, it's actually called FDG which stands for Fluorodeoxy-glucose, . . . in the brain. And as a result of that injection a scan of the brain is done. Probably takes about twenty minutes to a half hour and various brain [images] are able to be projected onto a screen and eventually onto a paper.
>
> Allows the neurologist to determine the metabolic activity in the brain. And it's a -- results of the metabolic activity

that a neurologist is able to make the determination whether there is abnormality in the brain.

Q. Have you in the past recommended that patients or people you have evaluated be subjected to this test?

A. Yes, I have. . . . Let me clarify, Mr. Moore, what I would generally do is recommend to -- for further testing particularly as again depending on my screening or my neuropsychological evaluation.

Sometimes a particular test is not necessary because some of the less sensitive tests might -- might show the brain damage. But if there is still a suspicion of damage and the less sensitive tests EEG and CAT scan could -- would not show, I would recommend a more sensitive test such as PET.

Q. How critical would the penalty input and the PET Scan in -- in this case in the organisity (sic) in Mr. Hoskins?

A. What -- one of the issues based on my findings is the possibility that there is a neurological problem which -- particularly with my findings which showed impairment in the frontal lobe which is the area which is responsible for inhibition, impulse control and so forth.

When there is a violent crime **such as in this particular situation, one of the things we would want to know is is there a neurological basis for causing a person's poor impulse control.**

Q. Is the PET Scan recognized in the field of neuropsychology as a valid diagnostic tool?

A. Yes, it is.

Q. Is it widely recognized as such?

A. It is widely recognized particularly in the last few years. It's a relatively new examination. I would say in the last three to five years it is has been used much more commonly than prior to that.

Q. What would be the significance of the information or data you would gather from that test as it relates to a penalty

phase proceeding?

A. Well, it would certainly in my opinion give me an opportunity to render an opinion with regard to the neurological status of this -- of Mr. Hoskins to a more definitive level than I was able to previously or that I can with the current data that I have available.

Q. So you believe that you could make a more definitive and more precise -- precise determination and an opinion with respect to Mr. Hoskins if you had the data from this test?

A. Yes, sir, I could.

Q. Do you recommend that test be performed upon Mr. Hoskins based upon your evaluation of him and the materials that you have outlined?

A. Yes, I do.

Q. Is it unusual for you to recommend that a PET Scan be done'?

A. I have recommended it in probably five to ten cases.

(SR 56-59) (emphasis added) While the above-quoted testimony was also quoted in the Initial Brief, the state has not addressed its contents which show that the mental health expert needed the test to make a more definitive evaluation on Hoskins' mental status at the time of the crime, which would have enabled the defendant to strengthen his argument in favor of mitigation and to further rebut aggravating circumstances, While Dr. Krop could not himself order the testing done, defense counsel proffered to the court that Jacksonville Memorial Hospital was ready, willing, and able to have its medical staff perform the 20-minute test should the court request the testing and order the defendant to be transported for said test. (SR 41-43)

The state's brief relies on the cross-examination of Dr. Krop at SR 64-65, to allegedly support its contention that the requested PET-Scan test would be of no benefit to the defense. While the questioning in this portion of the testimony appears somewhat confusing, the bottom line from Dr. Krop is that the testing would indeed be of benefit to him in rendering a more definitive opinion. (SR 65) That testimony is presented here to assist the Court in making its own interpretation of the evidence (in conjunction with the direct testimony from Dr. Krop already quoted above):

> Q [by prosecutor]: Doctor, you'll recall the State didn't dispute the organic brain damage [at the first penalty phase hearing]. Our question was whether or not that organic brain damage had any cause and effect relationship on the behavior here.
>
> And it was your conclusion repeatedly that, no, you could not say it did. Do you recall that?
>
> [defense objection omitted]
>
> Q. Doctor Krop, do you recall that testimony from the witness stand here in court?
>
> A [Dr. Krop]: Yes, I do. And, yes, I could say that.
>
> Q. Okay. Now why are we then to assume that this test is going to provide you with any ability to render any other opinion?
>
> A. Number one, the PET Scan would show a specific neurological finding such as a tumor or other type of organic process which specifically demonstrates, for example, a dysfunction in the frontal lobe.
>
> I would most likely be able to render a more definitive opinion as to my degree of certainty that this person has brain damage.
>
> Q. Well, Doctor, assuming that we won't dispute that he has brain damage, okay, the State never did dispute the

existence of brain damage.

My question is even assuming there is brain damage, is that going to change your answers was (sic) regard to the fact that you cannot say that there is a relationship between that brain damage and the specific behavior exhibited here?

A. That is probably true, **unless I received additional information.**

(SR 64-65) Coupled with the other testimony from Dr. Krop, it is evident that Dr. Krop needed the PET-Scan in order to more fully explore and evaluate Hoskins' organic brain damage and give more definitive testimony regarding the defendant's mental health in the context of this crime. This was Dr. Krop's conclusion following all of the testimony, despite the prosecutor's attempts to have him say otherwise. (SR 72; See also SR 58-59) It was also his testimony at the penalty phase hearing:

A [Dr. Krop]: . . . There are certain sensitive, more sensitive tests, though, which would be able to look inside the brain **to be able to measure more specifically exactly where there** may be **damage and the severity of damage. The kinds of tests that have been done can't actually measure that aspect, of it.**

Q [by defense counsel]: What type of tests are you thinking of?

A. Well, there's one newer test that is called a PET Scan, which is a measure -- basically it measures the heat in the brain and we're able to, through those kind of tests, get **a more specific measure,** better pictures of any types of abnormalities in the brain.

(R 1560; See also R 1567-1568) The jury was entitled to hear the additional evidence which could have been provided by this test.

With regard to the state's footnote number 15 on page 30 of the answer brief,

the appellant submits that the state's selective quotations do not show the whole picture, rather this was a discussion about possible hospital policy in ordering such a test for possible treatment of a patient. This Court is referred to the redirect examination at SR 71-72, wherein Dr. Krop indicated it would certainly be appropriate for the hospital to conduct the test upon a court order regarding penalty phase evaluations as opposed to life-threatening illnesses which would necessarily involve a physician.

Finally, what this issue boils down to is this: The trial court in its sentencing order gives only slight weight to the mental mitigation, saying there was evidence only of **"mild** brain abnormality" but no evidence that it actually accounted for the crimes. (R 2595) The state (both below and on appeal) also attempts to diminish the weight to be given the mental health mitigation in this case. Yet, Hoskins was denied the opportunity and ability to strengthen the evidence concerning the severity of the frontal lobe damage and that mental mitigation through the requested PET-Scan test, which, the testifying mental health expert indicated several times, would have strengthened his evaluation. The appellant is at a loss to see how the state and the trial court can diminish the weight to be given the mental mitigation in this case, yet continue to deny Hoskins the ability (through the PET-Scan) to show that it was entitled to greater weight.

POINT III.

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED AN IMPROPER AGGRAVATING CIRCUMSTANCE, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL.

The state contends at p. 44 of its brief that there was no evidence to show that the defendant may have been acting impulsively or in a rage when the killing occurred. The appellee does this by taking the testimony entirely out of context and equating the mental health expert's testimony that binding and gagging **could** be viewed as evidence of planning, as evidence that it definitely was planned, which was not the expert's testimony at all. In fact, Doctor Krop testified that, based on his experience with sexual offenders, typically this type of crime is not planned, but impulsive, especially with people who have frontal lobe damage:

> Q [by prosecutor]: Then if I understand correctly, the fact that Mr. Hoskins had frontal -- some frontal lobe damage, you cannot say with any certainty whether as a result of that frontal lobe damage Mr. Hoskins has some start/stop problems; would that be correct, Doctor?
>
> A [by Dr. Krop]: Not specific **to** him. I could say **individuals who have frontal lobe impairment often have that particular type of deficit in their behavior pattern.**
>
> Q. But you cannot say that is specific as to him
>
> A. That is correct.
>
> Q. Now, additionally, you used the term impulsively in

that an individual with some type of frontal lobe damage may react impulsively, and you used the analogy of an individual, a kid, a teenager, who gets into a fight and gets into a rage, if you will.

A. Yes.

Q. You recall that, Doctor?

A. Yes.

Q. Now, similarly, you cannot associate that type of frontal -- that activity which is related to frontal lobe damage to Mr. Hoskins as well, is that correct, Doctor?

A. I can only say that **individuals who have the kind of tests performance that, Mr. Hoskins had on the neuropsyche often show that type of impairment and that type of behavior pattern.**
I cannot say specifically in Mr. Hoskins' case that is the case. I don't have sufficient data to do that.[3]

Q. Now, I believe, Doctor, and taking into account the frontal lobe and the right and left side, that those particular features do not take into account the planning which might be utilized by an individual, is that correct, Doctor?

A. That would be another part of the brain.

Q. So the planning side of an individual in the course of a certain activity use certain planning mechanisms associated with the brain. That would be different from this frontal lobe damage; is that what you're saying, Doctor?

A. Yes.

Q. So therefore if an individual, to use an analogy, if you will, break -- broke into a home and raped an individual, and

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[3] See Point 11 of Initial Brief of Appellant and this Reply Brief, for argument on the issue of how the court's refusal to allow a further neurological test on the defendant deprived Dr. Krop of this additional data.

raped a person, an elderly person, that would constitute, possibly constitute, planning on that part of the individual. Would you agree with that, Doctor?

A. It certainly **could,** But also, if I can add, that individuals who engage in sexual assaults often **do not necessarily plan ahead of time to engage in that behavior.**

Often we see in my own work, in working with sex offenders, the rape is what we call a crime of convenience, often. And I don't mean to use that word loosely, but often we see rapes occur because the individual happens to be there or the perpetrator happens to come across the individual.

When rapes occur in a home kind of situation which there is also robbery or burglary, at least in my working with sex offenders, we often get the account that **the robbery or whatever was planned and then they came across a person and the rape occurred.**

So rape necessarily does not involve planning, although certainly it **could**.

Q. It could?

A. Yes.

Q. And similarly, if that person was an eighty year old woman, that might bc somewhat indicative of planning as opposed to impulsive'?

A. Well, that's really hard to say, because again, raping an eighty year old woman does not typically, to me, sound like something that would be planned, but I don't have enough data in this case to say one way or the other.

(R 1567-1570) (emphasis added) The doctor goes on to say, in response to the prosecutor's speculative, hypothetical questioning, that binding, gagging, and disposing of a body "to some degree," "generally," **"might** indicate some planning." (R 1570) This is **not,** as the state claims, evidence that the facts of this particular crime "do indicate advance planning by Hoskins." (Appellee's answer brief, p. 44)

Next, the state totally mischaracterizes the testimony in stating that "the evidence establishes that Hoskins' criminal behavior is not related, *in any way*, to whatever frontal lobe damage he may have, (TR 1576)" (Appellee's answer brief, p. 44) This statement is purely and simply false. The testimony on that page of the record indicates merely that frontal lobe damage "is usually not related" to planned behavior. (R 1576) But throughout the mental health expert's testimony, it is repeatedly indicated that damage to the frontal lobe will typically effect the stopping mechanism, often causing continuing violence or a frenzy or rage kind of reaction, the inability to control oneself; "and in terms of the specific violent behavior that I've been made aware of **in this case, certainly that could be related to an individual who had difficulties controlling his impulses once they got started."** (R 1549-1553, 1567-1568) (emphasis added) Thus, it is clear from this testimony that the state's contention (that the evidence affirmatively established no connection between the criminal behavior here and the brain damage) is utterly fallacious.

The state argues that, in considering the heinousness aggravating factor, the court only need consider the effect upon the victim, and can ignore the lack of intent on the defendant's part to inflict pain or torture and that the appellant's argument to the contrary "has no legal merit." (Appellee's answer brief, pp. 50-52) While the cases cited by the state may be interpreted to indicate that it is only the victim's perception which counts in determining HAC [see, e.g., Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990) wherein this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's"], this Court is directed to its own apparently conflicting decisions wherein this Court has taken a diametrically opposite view that

the HAC factor must look to the **intent of the defendant** to torture or cause suffering:

> Whether death is immediate or whether the victim lingers and suffers is pure fortuity. The **intent,** and method employed by the wrongdoers is what needs to be examined.

Mills v. State, 476 So.2d 172, 178 (Fla. 1985) (emphasis added). Also in Chesire v. State, 568 So.2d 908, 912 (Fla. 1990), this Court indicated that it has always focused on the mental state of the defendant to determine the applicability of WAC, writing:

> The factor of heinous atrocious or cruel is proper **only** in torturous murders -- those that evince extreme or outrageous depravity as exemplified either by the **desire** to inflict a high degree of pain or **utter indifference** to or **enjoyment** of the suffering of another. State v. Dixon, 283 So.2d 1 (Fla. 1973).

(emphasis added). See also Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992); Santos v. State, 591 So.2d 160, 163 (Fla. 1991); Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990) (wherein this Court rejected the trial court's finding of HAC where the evidence was consistent with the hypothesis that Porter's crime was a crime of passion, **not a crime that was meant to be deliberately and extraordinarily painful."** [emphasis in original]); Omelus v. State, 584 So.2d 563 (Fla. 1991) (HAC inapplicable where defendant did not intend hired killer to commit murder in a heinous fashion); Initial Brief of Appellant, pp. 5 1-55. To apply this factor in the instant case would be to ignore the clear holdings of Porter, Richardson, Santos, Cheshire, and Mills, and would result in vacillation on this Court's part concerning the definition of this aggravator, rendering it unconstitutionally vague under the federal and Florida constitutions.

Additionally, it ignores the testimony of the mental health expert who opined

that mental health problems such as that experienced by Hoskins could have caused him to lose control of his actions, causing a frenzy or rage (that, therefore, Hoskins did not intend for the killing to happen in the manner in which it happened.) Aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Because of the defendant's mental status and frontal lobe damage, he may not have been able to control his actions, specifically the stop mechanism, and may have acted in a rage or frenzy.

> [Dr. Harry Krop]: . . . I guess the simplest way to describe it is a rage reaction. When an individual may engage in violent behavior and then basically the behavior has been enacted sufficiently, at least we would think for the purpose of the violence, but yet the person goes way beyond what is necessary in terms of the violent acts, or is this frenzy a rage kind of reaction.

(R 1552) See also R 1553, "and in terms of the specific violent behavior that I've been made aware of in this case, certainly that could be related to an individual who had difficulties controlling his impulses once they got started." Thus, because of this possibility, this aggravator, which the appellant submits must focus on the perpetrator's intent, cannot be proven in this case beyond a reasonable doubt.

The sentence of death imposed upon Johnny Hoskins must be vacated. The trial court found an improper aggravating circumstance and gave the aggravators excessive weight, failed to consider (or unfittingly gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the aggravating circumstances outweighed the mitigating factors. These errors render Hoskins' death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments, and Article I, Sections 9, 16, and 17, of the Florida Constitution.

CROSS-APPEAL.

THE TRIAL COURT PROPERLY REJECTED THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED, AND PREMEDITATED BASED ON THE EVIDENCE IN THIS CASE.

The state takes issue with the trial court's rejection of the aggravating circumstance that the murder was committed in a cold, calculated, and premeditated manner. The state's argument on this point is based on nothing more than mere speculation as to missing facts. The trial court thoroughly and properly considered the evidence presented here and correctly determined that this circumstance had not been proven beyond a reasonable doubt. There is no basis for reversal of the trial court in this regard.

Aggravating circumstances must be proven beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Recognizing that this factor had to be something more than the premeditation element of first degree murder, this Court has interpreted it as a heightened form of premeditation. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Preston v. St&, 444 So.2d 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981).

The aggravating circumstance has four elements. Jackson v. State, 648 So.2d 85 (Fla. 1994); Walls v. State, 641 So.2d 381 (Fla. 1994). As this Court explained in Walls:

> Under *Jackson,* there are four elements that must exist to establish cold, calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." *Jackson* [648 So.2d at 89].

* * *

> Second, *Jackson* requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." *Jackson* [648 So.2d at 89].

* * *

> Third, *Jackson,* requires "heightened premeditation, " which is to say, premeditation over and above what is required for unaggravated first-degree murder.

* * *

> Finally, *Jackson* states that the murder must have "no pretense of moral or legal justification."

Walls v. State, supra at 387-388.

The state of mind of the perpetrator is critical to an analysis of the evidence for this aggravating circumstance. As noted in Jackson, supra at 89, an essential element is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." A killing in a fit of rage is inconsistent with the CCP factor. Crump v. State, 622 So.2d 963 (Fla. 1993); Richardson v. State, 604 So.2d 1107 (Fla. 1992); Mitchell v. State, 527 So.2d 179 (Fla. 1992). Consequently, impulsive or panic killings during a felony do not qualify for CCP. See, e.g, Rogers v. State, 511 So.2d 526 (Fla. 1987); Hamblen v. State, 527 So.2d *800* (Fla. 1988) (defendant shot robbery victim in the back of the head after becoming angry with her for activating the silent alarm); Thompson v. State, 456 So.2d 444 (Fla. 1984) (defendant shot gas station attendant after being told there was no money on the premises); Maxwell v. State, 443 So.2d 967 (Fla. 1984) (defendant shot his robbery victim when he verbally protested handing over his gold ring); White v. State, 446

So.2d 1031 (Fla. 1984) (defendant shot two people and attempted to shoot two others during a robbery). The "coldness" or the "calm and cool reflection" element is simply missing in these cases.

To support CCP the evidence must prove beyond a reasonable doubt that the murder was calculated -- committed pursuant to "... a careful plan or prearranged design to kill...". Rogers v. State, supra. "This aggravating factor is reserved primarily for execution or contract murders or witness elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). See also Maharaj v. State, 597 So.2d 786 (Fla. 1992); Pardo v. State, 563 So.2d 77 (Fla. 1990). An intentional killing during the commission of another felony does not necessarily qualify for premeditation aggravating circumstance. Maxwell v. State, supra. The fact that the underlying felony may have been fully planned ahead of time does not qualify the crime for the CCP factor if the plan did not also originally include the commission of the murder. Lawrence v. State, 614 So.2d 1092 (Fla. 1993); Rivera v. State, 498 So.2d 906 (Fla. 1986); Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984). There must be proven beyond a reasonable doubt "a careful plan or prearranged design to kill." Additionally, if in the perpetrator's mind he had a pretense of a justification for the murder, even if objectively no justification at all, this aggravating circumstance is inapplicable. Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim confronted and struggled with the defendant during a burglary).

A plan to kill cannot be inferred from a lack of evidence -- a mere suspicion is insufficient. Besaraba v. State, 656 So.2d 441 (Fla. 1995); Gore v. State, 599 So.2d 978 (Fla. 1992); Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988). See also Gorham v. State, 454 So.2d

556, 559 (Fla. 1984); Drake v. State, 441 So.2d 1079 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Mann v. State, 420 So.2d 578 (Fla. 1982) If the evidence can be interpreted to support CCP, but also a reasonable hypothesis other than a planned killing, the CCP factor has not been proven. Geralds v. State, 601 So.2d 1157 (Fla. 1992). Eutzy v. State, 458 So.2d 755 (Fla. 1984).

Simply proving a premeditated murder for purposes of guilt is not enough to support the CCP aggravating circumstance -- this Court has required greater deliberation and reflection. See Walls v. State, supra at 388. Without more, the manner of death does not establish the greater premeditation needed for the CCP factor. Even a manner of death which requires a period of time to accomplish its end does not necessarily provide the perpetrator with the needed time for calm refection. See, e.g., Campbell v. State, 571 So.2d 415 (Fla. 1990). Smothering the victim with evidence that the process required several minutes did not qualify the crime for the aggravating factor in Capehart v. State, 583 So.2d 1009 (Fla. 1991). Multiple wounds also do not prove the heightened premeditation required. See, e.g., Hamilton v. State, 547 So.2d 630 (Fla. 1989) (multiple wounds to two victims); Caruthers v. State, 465 So.2d 496 (Fla. 1985) (victim shot three times); Blanco v. State, 452 So.2d 520 (Fla. 1984) (victim shot seven times). A beating death with multiple wounds is also not necessarily CCP. King v. State, 436 So.2d SO (Fla. 1983); Wilson v. State, 436 So.2d 912 (Fla. 1983). Additionally, strangulation and asphyxiation without a prior prearranged plan to kill does not qualify. Hardwick v. State, 461 So.2d 79 (Fla. 1984).

Under the above-referenced state of the law on CCP and coupled with the trial court's factual findings rejecting this aggravator, it is clear that the state had not met its burden

of proving this aggravating circumstance beyond a reasonable doubt. The trial court, in rejecting this factor, found:

> This aggravating circumstance has not been proven beyond a reasonable doubt. A heightened form of premeditation is required to prove this aggravating circumstance. As interpreted by the Florida Supreme Court, this means "a degree of premeditation exceeding that necessary to support a finding of premeditated first-degree murder." Capitant v. State, 583 So.2d 1009 (Fla. 1991); Geralds v. St&, 601 So.2d 1157 (Fla. 1992). In the instant case, the circumstantial evidence presented on this issue was legally insufficient to negate other reasonable hypotheses of the degree of premeditation to mu rder .

(R 2592) On appeal, the question is whether the trial court's factual determination is supported by substantial, competent evidence. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). It clearly is, here.

In the instant case, the state's entire argument for this aggravator is based upon pure speculation. As the state attorney admitted to the jury below, he could not tell the jury where or when the victim was killed. (T 1737) Speculation is not enough. Besaraba, supra; Gore, supra; Lloyd, supra. The binding and gagging could have been completed inside the house; the beating and strangulation anywhere and anytime, including immediately outside of the house. The mere fact of these actions is insufficient to establish CCP. Campbell, supra; Capehart, supra; King, supra; Wilson, supra; Hardwick, supra. While there may have been a plan to burglarize the house, Hoskins may have been surprised by the victim and then acted out of panic, or in a rage or frenzy for the remainder of the crime, which does not support CCP. Maxwell, supra; Lawrence, supra; Crump, supra; Rogers; supra; Hamblen, supra; Jackson, supra.

The testimony of the mental health expert, in fact, supports this version of the facts. (See R1568-1570, quoted at pp. 20-21 of this reply brief) Dr. Krop opined that most often, in his dealings with sexual battery defendants, there is no "plan ahead of time to engage in that behavior;" "we often get the account that the robbery or whatever was planned and then they came across the person and the rape occurred." (R 1569-1570) Dr. Krop also opined that individuals with the type of frontal lobe damage from which the defendant suffers often will be impulsive and act out of rage or in a frenzy (R 155 1-1552), which will not support a finding of CCP. See Crump, supra; Hamblen, supra. The state did get Dr. Krop to indicate that while the rape does not necessarily involve planning, "it could." (R 1569) We cannot base the finding of CCP on an "it could." The doctor specifically stated that it did not seem to him that there was preplanning of the events here, but he did not "have enough data in this case to say one way or the other." (R 1570) Just as Dr. Krop does not have enough data in this case, neither do we.

The factor has not been proven beyond a reasonable doubt. The trial court was correct in rejecting this speculative aggravator as the evidence presented was "legally insufficient to negate other reasonable hypotheses of the degree of premeditation to murder."

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the Initial Brief, the appellant requests that this Honorable Court reverse the convictions and sentence of death and, as to Point I, remand for a new trial; as to Point II, remand with directions to hold a new penalty phase before a new jury; and as to Points TIT and IV, remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Johnny Hoskins, n/Ma Jamil Alle, #962032 (43-1191-A1), Union Correctional Institution, P.O. Box 221, Raiford, FL 32083, this 17th day of May, **1996.**

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