IN THE SUPREME COURT OF FLORIDA

CHARLES BRANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC07-2412
Lower Tribunal No. 04-CF-12631
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References to the record on appeal [volumes 1-11], which include the Court Reporter's transcripts, will be designated by the volume number and appropriate record or transcript page number (Vol. #/R page # or Vol. #/T page #). The supplemental record [volumes 12-18] will be designated as (Vol. #/R page #).

STATEMENT OF THE CASE AND FACTS

On July 1, 2004, the appellant/defendant, Charles Grover Brant, was 39 years old and lived with his wife, Melissa [McKinney], and their two sons. (V8/T139-140, 185-186, 202). After Brant's wife and children went to a movie on the evening of July 1, 2004, Brant went to the nearby residence of his 21-year-old neighbor, Sara Radfar. Brant sexually assaulted and then murdered Sara Radfar by repeated strangulation and suffocation. (V4/R736-737; V5/R797-802, 808-809, 811; V6/R1164-1170, 1174-1177; V8/T147-148; V9/T250, 318, 349-350). As the trial court summarized, Brant went to the victim's home on July 1, 2004, and

> entered with [the victim's] consent, ostensibly for the purpose of taking photographs of some tile work he had done in her house when he and his wife lived in that home several months before . . .
>
> The evidence is that [Brant] grabbed [Sara Redfar] and forcibly sexually assaulted her. He did not use a condom and he ejaculated. In the process he placed a sock in her mouth. He then choked her and left her on her bed, believing she was dead or not conscious. While he was then looking around the house, she regained consciousness and attempted to leave the house. **He grabbed her and took her back to the bed and strangled and suffocated her using his hands, a plastic bag over her head, and ligatures — a stocking, an electrical cord, and a dog leash - around her neck. She was conscious for some period of time and was obviously aware she was going to die, but she did not die immediately.** She "hiccupped" while he placed her body in the bath tub and opened the shower on her. The cause of death was strangulation and

> suffocation. She could have remained conscious for as little as seven to fourteen seconds, and possibly more. **She endured being violently sexually assaulted, being strangled to a state of unconsciousness, then regained consciousness, then was strangled again, to her death**.

(V4/736-737) (e.s.)

On July 14, 2004, Brant was charged by Indictment with premeditated murder (count 1), sexual battery (deadly force or force causing injury) (count 2), kidnapping (count 3), grand theft/motor vehicle (count 4), and burglary of a dwelling with assault or battery (count 4). (V1/R1, 40-42). On September 2, 2004, the State filed its notice of intent to seek the death penalty. (V1/R2, 60).

On May 25, 2007, Brant entered guilty pleas to all counts, open, without any plea agreement. Brant reserved his right to appeal a pretrial order denying a Fla.R.Crim.P. 3.190(c)(4) motion to dismiss the kidnapping count. (V1/R14; V3/R420-422; 753-789). On August 13, 2007, the trial court adjudicated Brant guilty on the five counts charged in the indictment. (V1/R17; V17/R1637). On August 22, 2007, Brant advised the trial court that he wished to waive his right to a penalty phase jury advisory sentence. The trial court conducted a colloquy and accepted Brant's waiver of a jury advisory recommendation and the trial court did not insist on a jury advisory verdict. *See,*

Mohammed v. State, *782 So. 2d 343 (Fla. 2001).* (V1/R19; V4/R699-700; V7/T2-15).

The trial court's corrected sentencing order (V4/R699-742) addressed the factual basis presented during the change-of-plea hearing of May 25, 2007, detailed each of the proposed aggravating and mitigating factors, and thoroughly summarized the evidence presented during the penalty phase proceedings of August 22 – August 24, 2007, and the *Spencer* hearing of October 8, 2007. The trial court's comprehensive order (V4/R699-742) (e.s.), states, in pertinent part:

Plea Colloquy

> The factual basis recited by the prosecutor during the 25 May 2007 guilty plea, to which Defendant conceded, demonstrated that:
>
> > The Defendant lived in a house close to Ms Radfar's residence, and that at some time prior, he and his wife lived in that same apartment. On 1 July 2004 in the evening hours while his wife and children were at a movie, Defendant went to Ms Radfar's residence and managed to get inside where he killed Ms Radfar by strangulation and suffocation. He used his hands, a plastic bag, a dog leash, an electrical cord, and stockings.
> >
> > Law enforcement officers found Ms Radfar's naked body in her shower with the water pouring over her body. Vaginal swabs showed Defendant's DNA in the collected semen.
> >
> > Law enforcement officers questioned Defendant on 4 July 2004 and he admitted having vaginal intercourse with Ms Radfar; that he entered her residence because he wanted to take photographs

of tile work he had done to the apartment; that when she came out of the bathroom he grabbed her and threw her on a bed and raped her without her consent, and that she resisted by words and acts.

The Defendant forcibly, secretly, and by threat, confined and abducted and imprisoned the victim with intent to inflict bodily harm and to terrorize her. At a time when he thought the victim was dead and while searching the residence, the victim got up and attempted to go out the door. He grabbed her, took her back to the bedroom and suffocated and choked her to death. He put her body in the bathroom and under the shower in an effort to clean her up. She was hiccupping.

When law enforcement officers entered her residence, they found cleaning materials, and later found her Bronco vehicle near the residence. The Defendant assaulted and battered the victim in her residence, which he entered under the pretense of taking pictures of tile work.

After killing Ms Radfar, Defendant went home and asked his wife to cut his hair. Law enforcement officers searched Defendant's garbage and found incriminating items of evidence, including the victim's car and house keys, and the victim's debit card.

Defendant returned to the victim's residence the following day to clean up, and avoided being detected by law enforcement officers by going out the back door when they arrived at the scene.

Defendant initially gave untruthful statements to investigators, including that he had seen a person leaving the scene of the offenses.

Law enforcement officers interviewed Defendant in Orange County on 4 July 2004 and recorded the session, which the State transcribed. After the interview they arrested him and thereafter booked him into the

Hillsborough jail on 7 July 2004. The State did not offer into evidence the recorded statement or the entire content of the statement. Defendant offered the entire recorded statement. The statement contains evidence that supports aggravation and evidence that supports mitigation.

The substance of his statement to the law enforcement officers, relevant to aggravating and mitigating circumstances, is as follows:

"I hurt that poor girl [crying]
"I've been praying for her for two days ... [sobbing]...that God let her go home ...

How did you kill her?
Strangulation

What did you use?
I don't know, just some wires

What else did you use?
I guess my hands

Where did you put her after you strangled her?
Bath tub

Prior to killing her, did you have sex with her?
Yes

Was it against her will?
Yes

Were you in her home prior to her coming home?
No

How did that lead up to getting into her home?
She came over I told her I needed pictures of the floors ... for my portfolio, so she let me in

What did you do once you were inside her house?
I took pictures of the floor and then ... and I grabbed her ... in the bathroom
I don't know what she was wearing

I just grabbed her and pulled her out of the bathroom and threw her on the bed

What was she saying?

She said ... when I was done, all she said was all I had to do ... all I had to do was ask

How did you have sex with her — vaginally or anally?

Vaginal, once, I don't know how long

And then what did you do?

Then I put the plastic bag, think she was gonna ... it would ... she would suffocate.

Where did you get that from?

The other bedroom

When you went into the other bedroom to get the plastic bag, what was she doing? Was she just lying there? Had you already choked her?

No

She was just lying there naked? She didn't try to run?

No. Not . . .

What did she say?

She didn't say anything. I tied her mouth up ... with a stocking. So I stuck a sock in her mouth and ...

After you went back into the bedroom and got this plastic bag and attempted to put it over her head, what did you do then?

I don't know. I'm trying to think. I started looking around the house. That's when she jumped up from the bed, ran to the front door and then I grabbed her, took her back into the bedroom and suffocated her. Then I suffocated her ... with my hand ... over her mouth and nose.

How long did you keep her in that position? A long time? Short time?

I don' know how long it was

After you did that, then what did you do?
Took her into the bathroom and then she was ...

Was she dead already then?
She kept hiccupping or something. I don't know, but it looked like she was dead, so that's when I grabbed the cords and used them to ...

Where did you get the leather dog leash from?
Off the floor ... I think the bedroom.

Where did you get the heater pad from?
The other bedroom floor ... I don't remember

Where you had sex with her or the other bedroom?
No, the other one, the other one

Were you panicking? I mean why were you grabbing all of these things to put around her neck?
I don't know, I just don't know ... she just kept struggling or wouldn't die or ... I don't know

So you put her in the bath tub ... what did you do then, after all this stuff is around her neck?
I don't know. I washed her down. Tried to wash everything off of her ... with just water.

What did you do then?
Cried ... in between the two bedrooms and the door ... and the bathroom door.

What did you do after that?
I don't know. About twenty minutes to dark, so I put the other clothes on ... her clothes ... whatever clothes was in the closet ... and a towel over my head. I jumped in the Bronco. Then I drove around that part of it. By the time it was dark, I got out and then I walked back to my house.

Where did you park her car?
I don't know ... Friendship Trail, the little dirt area.

How did you leave her house?
Through the front door

Did you ever go back into her house again?
Yes. The next day, right before the officer got there I wiped my prints. Trying to wipe off the most stuff I could. I started thinking about things I had touched and this and that. I was trying to wipe everything off.

Did you try to make it look like a burglary?
No.

Did you open the back window?
When the officer came to the door that's when I went out the back window, jumped over the fence, and ran inside.

Were you in the house when the cops came to the house?
Just got in there and was trying to clean up and that's ...

Let me clarify ... in your initial statement ... you described a man in a yellow rain coat with a hood ... was that a fictitious story?
Yes

When did you put all the stuff in your trash cans?
I don't know ... when I got back from the Bronco ... when I parked the Bronco and came back.

Did she expect you?
Yes. She came to my house because I was supposed to take pictures of the floor ... that's what originally was going to do ... And just something ...

Did you wear a condom?
No

Did you ejaculate in her?
Yes

Do you have a key from when you used to live there?

No

During this time, was your wife at movies with children?

Yes

Did you ask your wife to do something?

Yes — cut my hair, because I had lice ... nothing to do with altering my appearance

Did you send your wife to movies on purpose, so you could do this?

No

Do you have any questions?

It torments me every day [crying]. I tried and tried. I keep doing more drugs and more drugs and ... it just controls me. It gets harder and harder [sobbing]. I hurt everybody. I hurt that girl.

I hurt that poor girl, my wife, I hurt my family. [sobbing]

Is there anything else you want to say?

That I'm sorry for hurting that girl and *hurting her family and just seeing her family there crying and Steve. I don't what made me do it [crying]. I just don't know. [fn1]*

[fn1] The CD of the interview was not played in court for the court reporter to attempt to capture for the record; rather, defense counsel introduced the CD and a copy of a stipulated redacted transcript [in compliance with the Court's order in limine] of same as defense exhibits 13 and 14 for the Court to consider in mitigation. Hence, the interview will not be contained in the trial transcript.

* * *

. . . [The] Court received in evidence certain photographs, including State Exhibits 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59. Most

are photographs of the deceased as she was found in her tub, and are relevant to two of the five proposed aggravating circumstances – "heinous, atrocious, or cruel," and "while engaged in a sexual battery, burglary, or kidnap." They also include a close view of the deceased's face in her tub; a view of the deceased with the plastic bag over her face and ligatures around her neck; a view of the deceased's face with a ligature around her neck; a view of the back of the deceased's head showing the nylon stocking knotted at the back of her neck; a view of the right side of the deceased's face after the bag and ligatures were removed; a view of the left side of her neck; a view of a bruise under her left breast area; a view of two minor puncture wounds; a view of bruising on the back of her left upper arm; a view of injuries to the back side of her left hand; a view of bruising on the back of her right upper arm; a picture of the nylon ligature; a picture of the heating pad electrical cord ligature; and a picture of the dog leash ligature. These are relevant and the Court will consider them.

* * *

The witnesses testified as follows.

Melissa McKinney, Defendant's former wife, called by the State, testified that she married Defendant in 1991 and that they divorced in 2004. They have two sons, Seth and Noah. They at one time lived in Ms. Radfar's house. On 1 July 2004, a Thursday, she worked during the day and took the children to a movie in the evening. Defendant did not appear to her to be under the influence of drugs that afternoon or when she returned from the movies in the evening, and he did not act abnormally in any way. Before they went to bed he asked her to cut his hair because of his concern for a lice problem, which she did. He normally wanted his hair long. He went to Orlando to his mother's house Friday afternoon unexpectedly.

On further examination by Mr. Fraser Ms. McKinney described that when she met Defendant in Bible College

he wanted to be a minister and start a church. During their marriage he discussed his abusive stepfather with whom he wanted very much to have a relationship. Also during their marriage they separated eight or nine times, and he used marijuana and ecstasy, and most recently methamphetamine, about 6 months before the murder. He used methamphetamine at least weekly, which would allow him to stay awake for four to five nights a week without sleep, after which he would "crash." While using this drug, he would be cheerful, and when coming off of it he would be irritable and snappy. During approximately the six weeks period before the murder he was using the drug, and developed a habit of talking to himself.

He was good with his children and coached little league at one time.

During approximately the six months period before the murder, she and Defendant engaged in sex games. During intercourse he would hold her hands above her head and tie her up, and on other occasions he would sneak in and sexually "assault" her. She did not object initially, until he became too rough and hurt and bruised her. When she protested, he would relent, but he continued to "surprise" her in much the same manner, and would hide in the apartment and "assault" her. On one such occasion she called 911 because she did not know it was her husband "assaulting" her while masked, until he pulled off the mask. Their daily sexual relationship reached the point where it consisted of "normal" consensual sexual intercourse and frequent not-consensual "rough" sexual intercourse. On 30 June 2004, Wednesday, Defendant "attacked" her by surprise by hiding in the bedroom and throwing her on the bed face down and attempting to bind her hands and attempting to put a sock in her mouth. He pulled her pants down. She was able to get away and go the bathroom. She stayed in the bathroom the entire night. The next morning when she asked him why he had done it and told him he would have to stop, he responded that he didn't do anything. She threatened to call the police. She knew he was using methamphetamine during this incident, and had been up for several days.

Dr. Jacqueline Lee, an associate medical examiner, called by the State, examined the victim at the scene of the homicide. She had a slightly torn plastic bag over her head and face which was held in place by several ligatures and a leather dog leash, a heating pad cord, and a nylon stocking wrapped around her neck. She had bruises on the front and right side neck, left check, right jaw, right scalp, left shoulder, left breast, right buttocks, right upper arm, right forearm, left forearm, left hand, left wrist, right knee, and left thigh, all of which were inflicted while alive, and some of which are defensive injuries. Dr. Lee opined is that the victim was attacked from behind, and that the blunt trauma injuries to her face, trunk of body, and head, were painful. *None of the injuries was life threatening, and none was deep.* The cause of death was strangulation and suffocation as a result of the plastic bag over head held in place with a ligature. *Dr. Lee did not have an opinion as to how long it took for the strangulation to render the victim unconscious, and conceded that it could have taken as little as seven to fourteen seconds.* She found no forensic evidence to suggest that during the initial attack, just before she got up and walked to the door, she was unconscious. She further opined that the victim lived through some of the attack.

John Hess, III, a minister called by Defendant, *was a bible student with Defendant in Virginia in the early 1990's. He provided the Court with copies of Defendant's grades while a student, which were relatively good. In his application to attend the school, Defendant acknowledged prior drug use. Several years later, Defendant called Mr. Hess seeking help because he had again gotten involved in drugs and wanted to turn his life around.*

James Harden, a fellow student of Defendant at Bible School called by Defendant, *testified that Defendant lived with him for about three months when he was dating Melissa. He was respectful and attended church regularly. Mr. Harden visited Defendant at the jail after he was arrested. He would reminisce about his sons and become very emotional.*

***Steve Alvord, a former co-worker of Defendant called by Defendant**, described him as very smart with respect to mechanical abilities. He was a fast learner and did not need supervision working on elevators. During jail visits, Defendant expressed that he was sorry for the situation and wished that these things had not happened; that he wished he were back working with Mr. Alvord.*

Christi Esqinaldo, a Hillsborough County Sheriff's Office detective called by the State, located the victim's Bronco vehicle, impounded it, and took into evidence several items. She participated in the recorded interview of Defendant on 4 July 2004.

***Thomas Rabeau, a former volunteer Chaplain at the Hillsborough County Jail called by Defendant**, visited with Defendant weekly after his incarceration in 2004 approximately 150 times. They almost always discussed forgiveness ... Defendant's forgiveness from himself because he can't forgive himself for what he did; forgiveness from God for what he did; and from his family. During the visits, Defendant cried a lot and expressed remorse over the loss of his family and for everything that happened. Defendant expressed that because what he did is so hideous, he does not believe that he can forgive himself; that his ex-wife can forgive him; that his parents can forgive him; or that anyone can forgive him for what he did. Defendant demonstrated to him how he killed the victim – by putting an arm around her neck in a strangling hold.*

Frank Losat, a Hillsborough County Sheriff's Office detective called by the State, participated in the 4 July 2004 interview of Defendant in Orange County. He described the interview as follows.

> The Defendant initially told other deputies or detectives that he had seen a man running from the victim's apartment, but during the interview admitted that he assaulted and killed the victim in her home. He summarized the incriminating portions contained in the recorded interview. He testified that the Defendant appeared sober on 4 July 2004 during the interview, and that he

> initially said that he had seen a person running through the back yard wearing a raincoat. He later changed his story and said that he went to Ms. Radfar's house to take pictures of the floor for his portfolio and that she let him in and that he started taking pictures. When she came out of the bathroom, he didn't know why, he grabbed her forcefully and dragged her onto a bed and sexually assaulted her vaginally against her will and did not use a condom. He placed a sock in her mouth to keep her quiet. He choked and suffocated her for a little bit and he thought she had passed out or was dying, and he thought she was not a threat and got off the bed looking around the house. At some point she gained consciousness, jumped from the bed, and ran to the front door. He grabbed her and took her back to the room and choked her manually and placed a plastic bag over her head to suffocate her. He then took her to the bathroom and put her in the tub. He thought she was dead but was hiccupping. He then got a leash and an electrical cord and wrapped them around her neck to strangle her. He also used a stocking around her neck.

The State did not offer into evidence the recorded statement which contained evidence of remorse. [fn2]

On cross examination by Mr. Fraser, Detective Losat acknowledged that Defendant was cooperative at his mother's residence; that he accompanied them to the Orlando Sheriff's Office voluntarily; that he did not attempt to run when he saw the detectives at his mother's home; and that on the ride to the station house, he told them several times that he had tried to turn himself in on at least two occasions.

Ted Fitzpatrick, a retired Hillsborough County Deputy Sheriff called by the State, responded to the deceased's home on 2 July 2004 and found her body in the tub with a belt, a chord, [sic] and a plastic bag around her neck, and the shower running pouring water on her nude body.

Steven Ball, the victim's boyfriend, called by the State, knew that the Defendant had lived in the victim's apartment and had a key, and that the Defendant had done some work in that apartment for the victim.

Kathy Smith, a retired HCSO homicide detective called by the State, had contact with Defendant on 2 July 2004 at 5:00 p.m. He appeared lucid and coherent. She recovered items of incriminating evidence in Defendant's garbage, including a white in color man's shirt, latex gloves, the victim's car keys, her Visa debit card, a hosiery box, and hair clippings. The Defendant told her he had seen the victim with a white male of whom he gave a detailed description, and had seen someone fleeing from the scene wearing a yellow raincoat.

[fn2] Defense counsel offered the recorded interview in its entirety (as redacted by stipulation) in evidence during Defendant's case. The State apparently was attempting to avoid introducing evidence of remorse Defendant expressed in the interview. The summarized testimony of the interview is not inconsistent with the recorded interview. The Court will therefore consider the latter in assessing whether the latter supports any particular aggravating circumstance, even if not offered by the State.

Rodney Riddle, a Hillsborough County Sheriff's Office deputy called by the State, spoke with Defendant at his residence on 2 July 2004. Defendant told him he saw a white male with black pants with a yellow raincoat and yellow hood running from the victim's residence at about 7:00 p.m. He described Defendant as coherent and sober.

John Burtt, a neighbor of Defendant and of the deceased Sara Radfar, called by the State, arrived home at 5:00 p.m. on 2 July 2004 the afternoon the body Ms. Radfar was found, and spoke with Defendant. He appeared sober and lucid.

The parties stipulated that laboratory DNA analysis established that Defendant's semen was found on the victim's vaginal swab.

The State rested after the testimony of Detective Losat.

The Defendant's additional evidence in mitigation is summarized as follows:

Leon Jackson, a pastor in Tampa, called by Defendant*, is related to Defendant's ex-wife Melissa McKinney. In 2003 he helped the Brants with their marital problems, and Defendant acknowledged his drug problem and recognized he needed help. He tried to help him get into an inpatient drug treatment program, but Mr. Brant could not afford to not work because of family financial responsibilities. He described Defendant as insecure and wanting everyone to be his friend, primarily because he grew up in a very dysfunctional family and did not have a real father figure growing up. He saw that Defendant interacted with his sons more as a friend to them than as a father figure, in that they played games together, went to the beach together, and surfed. He suggests that if sentenced to life imprisonment, Mr. Brant might develop the capacity to counsel fellow inmates.*

Dr. Michael Maher, a board certified psychiatrist called by Defendant*, evaluated Defendant. He reviewed court records and mental health records and reports, including PET scan information. Dr. Maher has expertise in the behavior of persons who abuse methamphetamine. He describes Defendant as a person who regularly worked and developed a dependence on methamphetamine, as opposed to a person who used the drug only for recreation. As such, he tried, unsuccessfully, to live a normal life, and because of the drug dependence, he had periods of psychosis manifested by periods of being highly energized, having racing thoughts, being irritable, being fidgety, having difficulty sitting still, feeling, and seeing. He would hear things that he was not sure were real, and heard sounds he was not sure of ... he had auditory hallucinations. He tried to not look like he*

was using drugs. Methamphetamine abuse affects the relationship between executive functions and impulse control, which means that it decreases a person's ability to control his impulses.

Mr. Brant's PET scan demonstrates lack of or underutilization of glucose in the brain, and is consistent with an abnormal brain, but no clinical diagnosis can be associated with the abnormality, and the abnormality is not associated with particular behavior, and does not explain the mechanism as to why certain behavior has or has not occurred. It only suggests that the behavior center affected by the lack of glucose demonstrated on the PET scan is consistent with Defendant's impulsive behavior.

Mr. Brant's history of problems beginning when he was a child, and his pattern of sexual behavior with his wife, and severe use of methamphetamines, are consistent with an "obsessive pattern of sexual interest."

Dr. Maher diagnosed Defendant to have "methamphetamine dependence – severe, associated with psychotic episodes, sexual obsessive disorder, and chronic depression," conditions he has had all of his life.

Dr. Maher opined that as a result of a mental disease or defect, Defendant's ability to conform his behavior to the requirements of the law was substantially impaired.

On further examination by Mr. Harb, Dr. Maher explained that Defendant suffered from attention deficit syndrome as a child, which played a role in the way he became later; and that his review of the police reports demonstrates Defendant's acceptance of responsibility and his remorse for what he did; and that the killing and the rape psychologically and neurologically were more one event than two separate events, and they point to evidence of brain abnormality because they are clearly out of character for Defendant; and that Defendant has an Axis I diagnosis of sexual obsession disorder.

***Gloria Milliner, a family friend, called by Defendant**, knew Defendant and his mother Crystal and step father Marvin Coleman from Virginia. Marvin Coleman and Crystal later lived with Mr. & Mrs. Milliner. She has known Marvin Coleman since 1988. He is now deceased. He was a controlling and violent person. Charles (Chuck) Brant was always good with her, and did not use alcohol or drugs, and was never violent. He was a good father to his then three year old son Seth.*

On further examination by Mr. Harb, Ms. Milliner described that Mr. Coleman was not close to Defendant, and that there was no affection between them, apparently because he was the product of Crystal's prior marriage. Mr. Coleman had a bad temper and Defendant did not. Mr. Coleman abused drugs.

***Crystal Coleman, Defendant's mother, called by Defendant**, described that her mother suffered from depression and was medicated for several years, and that her father was an alcoholic and physically abusive to her mother. Her father's mother was committed to a mental institution. Charles E. Brant, Defendant's father, left Crystal when Defendant was an infant. Charles E. Brant was of very low intelligence. Crystal Coleman was committed to a mental facility after she gave birth to Defendant, and at one time attempted to take her own life. The family sent Defendant to live with his paternal grandparents in Virginia. Crystal Coleman has been on psychotropic mediations all of her life. Defendant's grandfather too was of very low intelligence. She later got custody of Defendant, and he exhibited violent behavior, such as banging his head on walls, eating wall plaster, and eating fertilizer.*

She later married Marvin Coleman when Defendant was five years old, and she had one child with him, Garrett. Her marriage with Mr. Coleman was horrible. He was verbally abusive with her and the Defendant, associated with alcohol abuse. He did not like Chuck (Defendant) and was negative and derogatory toward him, often telling him he was no good. Chuck was very good with his brother Garrett.

Defendant moved out of the home at age seventeen to live with a friend. He was later arrested for a petit theft and bad check charge, but never for any violent offense.

***Sherry Coleman, the Defendant's older sister, called by Defendant**, testified that as a child she lived with Defendant, Crystal Coleman, and Marvin Coleman. Marvin Coleman was a bully with Defendant and was verbally and mentally abusive to their mother, Crystal. They never knew how Mr. Coleman would be at dinner. He would always tell Chuck, who was about eight years old then, that he would never be anything when he grew up, that he was not going to be a man, and that he could beat him up. He told him he would end up in jail one day. Mr. Coleman singled out Chuck for abuse more than the other two children, although she never saw him physically abuse him. He never showed the children affection. Chuck would cry and often not eat dinner. The abuse got worse as Mr. Coleman became more alcoholic. He underwent a religious conversion after she and Chuck were gone from the home. Her mother told her she was afraid to leave him because he had threatened to kill the family.*

Mr. Coleman began to sexually abuse her (Sherry) when she was thirteen years old. This abuse continued for about three years. She did not disclose this information until she testified at this trial because she had blocked it from her memory.

She learned that Chuck and Mr. Coleman, at some time before he died, spoke to each other. Chuck told her it was a blessing to talk to him.

The sworn statements of Garrett Coleman offered by the State in rebuttal do not rebut anything. Rather, they support Sherry Coleman's description of Marvin Coleman.

In July, 2004 she learned that Chuck had told their brother Garret about what happened to Sara, and that he somehow was a part of it and wanted to turn himself in. They all went to a police station to turn

him in but it was closed, so they went to another police station in Orlando to turn him in, but the officer told him they did not have any information on him.

***Dr. Valerie McClain, a psychologist called by Defendant**, evaluated Defendant in 2005. She did psychological testing and reviewed pertinent documents and reports. She diagnosed Defendant as having polysubstance dependence, major depression-recurrent, and cognitive disorder – not otherwise specified.*

She opined that the Defendant's ability to conform his conduct to the requirements of the law was substantially impaired on 1 July 2004, and that he has difficulty with impulse control, based on his brain functioning deficits and academic records. He tested very low with language skills.

Mr. Harb on cross examination, elicited testimony that Defendant told Dr. McClain that on the date of the crimes he had been doing significant amounts of crystal methamphetamines and ecstasy for eight days straight, and had consumed a 12-pack of alcohol that day, and had not been sleeping well. He described to her that he went to the house to take pictures of the tile and that he grabbed her and tied her and had sex with her. He raped her vaginally, put a bag over her head and tied it with an extension cord to tie the bag down, then looked around the house. She got up and said there was money in the closet and took off towards the door; he grabbed her and smothered her and he covered her mouth and nose while he straddled over her. *He further elicited that she diagnosed him as having difficulty with learning and memory.*

Methamphetamine use makes anger management problems worse, and would render a person more likely to act out or to be impulsive.

The defense rested after Dr. McClain testified. The Defendant elected to not testify.

Mr. James Ellis Harden, son of James Donald Harden, was called by the State in rebuttal. His

testimony rebutted nothing. The Court will disregard his testimony.

Donald R. Taylor, Jr., a forensic psychiatrist called by the State in rebuttal, evaluated Defendant in July 2006 and August 2007. He reviewed medical records and court documents, including PET scan reports, a science of which he has no expertise. *He did not perceive Defendant to be malingering. He diagnosed Defendant to have three Axis 1 disorders ... substance dependence disorder, learning disorder, and sexual sadism.* He did not find evidence of brain injury.

With respect to the issue – the mitigating factor – of whether the defendant's ability to conform his conduct to the requirements of the law was substantially impaired, *he opined first that with respect to the specific act of committing sexual battery, the Defendant's ability to conform his conduct to the requirements of the law was substantially impaired, because he was under the influence of methamphetamine*, and he opined second that with respect to the specific act of killing the victim, the Defendant's ability to conform his conduct to the requirements of the law was not substantially impaired.

Mr. Fraser on cross examination elicited that Defendant is not a sociopath or psychopath, and that his condition of sexual sadism arises from a genetic predisposition and childhood environment, which are factors over which Defendant has no control, and, that the mental condition that substantially impaired his ability to conform his conduct to the requirements of the law when he committed the sexual battery remained the same; that what changed was the nature of the subsequent crime – homicide.

He further elicited that prior to 2004 Defendant had no history of committing any violent offense.

On *8 October 2007 the Court, at Defendant's request, conducted a Spencer hearing*.

Melissa McKinney, Defendant's former wife, recalled by Defendant*, testified telephonically. They are the parents of Seth, age 12, and Noah, age 9. They now live in Texas. Prior to moving away, she and the children visited Defendant at the jail four or five times. During the August, 2007 trial she and the children also visited with him in the courtroom. These courtroom visits went well in that he seemed to encourage the boys and asked them how they were doing in school and what they would be doing for the summer. They were talkative and opened up with him. Counsel introduced letters the boys had sent Defendant as Defense Composite Exhibit 1. Ms. McKinney has made arrangements to keep him apprised of their grades and activities. She always tells them that their father loves them and wants to hear from the, [sic] which helps them to open up with their feelings. She intends to encourage the boys to see their father and to write him.*

Finally, the State and Defendant stipulated to the introduction of two sworn statements of Garrett C. Coleman, Defendant's half brother, given to Mr. Harb on 27 August 2004 and 19 July 2006. The State suggests the statements rebut defense evidence about Marvin Coleman's attitudes and behaviors. Defendant suggests it supplements the evidence of his narcotic abuse.

In the August, 2004 statement, *Garrett Coleman described his father Marvin Coleman as mentally abusive to the entire family, and physically abusive to Chuck, especially when he was a teenager. He abused alcohol for many years and at one point in his life stopped drinking, and stopped being so abusive to the family.* Defendant went to Garrett Coleman's home after the homicide, and told him he had hallucinations and that he might be involved in the homicide they were investigating. *The Defendant told him he wanted to talk to the police, and they went to a local police station to turn himself in to the police. He knew Defendant had been using Ecstasy at that time and before then, and knew about the effects it had on his life. He also knows him to not be violent.* In the July, 2006 statement, Garrett Coleman stated that *when Defendant came to his house after the homicide, he was*

"messed up on crystal meth, still smoking it," and that he could not understand what he was saying, but he know there was a problem. He again described how they tried to go to the police, and how his brother told him he had been hooked on crystal meth for several months and was getting progressively words. Defendant slept at his home and they went to the beach the next day. Defendant was again high on drugs and told him that he used what he had left. He described him as always being responsible, having a good job, and loving his family. He told him he was sorry, that he didn't mean to hurt the family by doing it, that it just happened.

This evidence does not rebut any mitigation evidence, rather, it corroborates evidence of Mr. Coleman's demeanor.

The Court will consider this as mitigation.

State's Arguments in Support of Aggravating Circumstances

The State cites numerous cases in support of each of the proposed aggravating circumstances, and argues that the facts support each circumstance as follows.

The Capital Felony was Especially Heinous, Atrocious, or Cruel

Defendant gained entry to victim's residence and grabbed and dragged her and pushed her onto the bed and raped her. She resisted and struggled with him. He tied her mouth with a stocking after stuffing her mouth with a sock. After he raped her and while he was looking around the house, she got up from the bed and went towards the door. He grabbed her and took her to the bedroom where he suffocated her and strangled her, using his hand, a sock, a stocking, an electrical cord, a dog leash, and a plastic bag. He then placed her in the bathtub. She was hiccupping at the time. She was conscious and aware for the majority of the assault. During the sexual assault the victim yelled at Defendant to stop, and after the assault she and he

spoke. She suffered 13 to 15 injuries, some of which were defense and some of which were painful.

The medical examiner testified the assault could have lasted from minutes to hours and that most likely the Defendant strangled her and then suffocated her then strangled her again.

Dr. Taylor diagnosed Defendant as a sexual sadist, a condition in which the person becomes sexually excited by either causing suffering or humiliation to another.

The State cites *State v. Dixon, 283 So.2d 1 (Fla. 1973); Smalley v. State, 546 So.2d 720 (Fla. 1989); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Sochor v. Florida, 112 S.Ct. 2114 (1992); Espinosa v. Florida, 112 S.Ct. 2926 (1992); Richardson v. State, 604 So.2d 1107 (Fla. 1992); James v. State, 695 So.2d 1229 (Fla. 1997); Johnson v. State, 465 So.2d 499 (Fla. 1985); Alvord v. State, 322 So.2d 533 (Fla. 1975); Orme v. State, 677 So.2d 258 (Fla. 1996); Sireci v. Moore, 825 So.2d 882 (Fla. 2002)*, and argues this aggravator is proven beyond a reasonable doubt and that the Court should give it great weight.

The Capital Felony Committed While Engaged in Commission of Burglary, Kidnapping, or Sexual Battery

Defendant unlawfully entered or remained in the victim's dwelling with intent to commit an offense, and committed a kidnapping and sexual battery. The burglary, kidnapping, and sexual battery are statutorily enumerated offenses to which Defendant pled guilty. The State cites no authority, and argues this aggravating circumstance was proven beyond a reasonable doubt and that the Court should give it great weight.

The Capital Felony Was Committed for the Purpose of Preventing a Lawful Arrest (Elimination of a Witness)

The Defendant's intercepting the victim's attempt to leave her residence and his actions after the

murder including cleaning the victim's body and removing physical evidence are evidence of a continuation of his attempt to avoid detection.

The only reasonable inference is that Defendant killed the victim, his neighbor who could identify him, in order to eliminate her as the sole witness to his already completed crimes of burglary, kidnapping, and sexual battery. He had no other reason, and the victim failed to resist his assault and did not attempt to stop or prevent his escape.

The State cites *Howell v. State, 707 So.2d 674 (Fla. 1998); Willacy v. State, 696 So.2d 693 (Fla. 1997); Swafford v. State, 533 So.2d 270 (Fla. 1988); Hoskins v. State, 965 So.2d 1 (Fla. 2007)*, and argues this aggravator is proven beyond a reasonable doubt and that the Court should give it great weight.

The Capital Felony Was a Homicide and Was Committed In a Cold, Calculated, and Premeditated Manner Without any Pretense of Moral or Legal Justification

The circumstances that support this aggravator are that shortly before the homicide, the victim's boyfriend moved out of their common residence, and she lived alone. Defendant and his family had lived in that same unit and moved out about a year before the homicide, and was therefore familiar with the residence. He still had in his possession a key and the Defendant gave it to him. Defendant told others that a few days prior to the homicide the victim asked him to inspect her windows to make sure they were secured, and he did the inspection. Defendant could have entered or left the residence through a rear window. Defendant's wife testified that she and Defendant engaged in sex daily, and that once every two weeks he would force her into rough sex, during which he would wear latex gloves and would stuff a sock in her mouth; and that they last had forced sex the night before the murder and that the next morning she threatened to report him to the police. The Defendant claimed he went to the victim's residence to take pictures, but he there is no evidence he had a camera or took pictures, or that he told his family

about his plans to take pictures. He declined to go to the movies with his family. Collected physical evidence, including latex gloves, a sock, a stocking, and a yellow raincoat suggests he took these items to the victim's residence.

The State argues the evidence proves that Defendant planned his actions before and after the homicide, and that once his wife told him he could no longer rape her, he went elsewhere to practice his sadistic tendencies. He raped the victim the same way he raped his wife.

The State cites *Jackson v. State, 648 So.2d 85 (Fla. 1994); Rogers v. State, 51] So.2d 526 (Fla. 1987); Hill v. State, 422 So.2d 816 (Fla. 1982)*, and argues the evidence proves this aggravating circumstance beyond a reasonable doubt, in that that the Defendant's actions reached a level of heightened premeditation, and that he acted with cool and calm reflection without any pretense of legal or moral justification, and that the Court should give it great weight.

The Capital Felony Was Committed for Pecuniary Gain

Defendant's wife at the time of the offenses had been asking him for money to pay bills which he did not have. During this time he was consuming drugs heavily.

Defendant told Dr. McClain that the victim told him there was money in the closet. He stole items from the residence, including clothing, keys, credit cards, a towel, and the car.

The State cites *Peek v. State, 395 So.2d 492 (Fla. 1980); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Porter v. State, 429 So.2d 293 (Fla. 1983)*, and agues this aggravator is proved beyond a reasonable doubt and that the Court should give it great weight.

State's Arguments in Response to Defendant's Mitigating Circumstances

The State concedes that most of the mitigating circumstances have been established, but argues that the Court should give them little or moderate weight. As to others, the State argues that they were not established by the evidence, and that the Court should so find.

Defendant's Arguments In Response to State's Aggravating Circumstances

In response to the State's argument in support of the proposed aggravating circumstances, defense counsel cites numerous authorities, and argues as follows.

Pecuniary Gain

Counsel argues that the evidence is that the Defendant only moved the victim's car 388 feet from the residence, apparently to mislead anyone looking for her, and that nominal personal property taken from the residence, which he discarded, does not provide or establish a motive for murder. Counsel cites *Chaky v. State, 65] So.2d 1169 (Fla. 1995); Peek v. State, 395 So.2d 492 (Fla. 1980)*.

Cold, Calculated, and Premeditated

Counsel argues the evidence establishes only one of the four required elements of this aggravator - that Defendant had no pretense of moral or legal justification to murder, and, that it does not establish the other three required elements – cool and calm reflection rather than prompted by emotion; frenzy, panic, or fit of rage; or careful prearranged design to commit murder before the killing; and exhibiting heightened premeditation. Counsel cites *Owens v. State, 854 So.2d 182 (Fla. 2003); Smith v. State, 515 So.2d 182(Fla. 1987).*

Counsel argues that the evidence did not establish that the stocking Defendant used to strangle the victim came from his home rather than the victim's

home. The evidence is that Defendant did not use a condom during the sexual battery, and, the evidence did not establish that the latex gloves recovered in Defendant's home does not support the suggestion that he used him during the offenses, since the evidence is that he returned to the victim's home the next day to eliminate evidence, including fingerprints, suggesting he did not use gloves. He did not remove or destroy a note he left for the victim to call him. The note was found in the victim's vehicle.

Counsel further argues that the expert testimony of Dr. Taylor and of Dr. Maher that Defendant's ability to conform his conduct to the requirements of the law, at least as it pertains to the sexual battery, was substantially impaired, vitiates a finding that the killing was the product of cool and calm reflection.

Witness Elimination

Counsel argues that nothing in the State's evidence addressed Defendant's reason for the murder. The only testimony related to this issue was that of Dr. Maher, a defense witness, who acknowledged on cross examination that Defendant possibly intended to eliminate a witness.

He further argues that the victim's ability to identify him as the person who assaulted her, standing alone, is not sufficient to justify a finding of witness elimination. Counsel cites *Farina v. State, 801 So.2d 44 (Fla. 2001), Consalvo v. State, 697 So.2d 805 (Fla. 1996); Jennings v. State, 718 So.2d 144 (Fla. 1998); Davis v. State, 69*8 So.2d 1182 (Fla. 1997).

Heinous, Atrocious, or Cruel

Counsel concedes that the evidence established this aggravator beyond a reasonable doubt, but argues that it is not entitled to great weight. Counsel cites *Barnhill v. State, 834 So.2d 836 (Fla. 2002), Offord v. State, 959 So.2d 187 (Fla. 2007); Diaz v. State, 860 So.2d 960 (Fla. 2003)*

Committed While Committing Sexual Battery, Burglary, or Kidnapping

Defendant concedes that the evidence established the aggravator beyond a reasonable doubt, but argues that the Court should consider only one of the three crimes – burglary, sexual battery, or grand theft as an aggravator, not all three. Counsel cites *Brown v. State, 473 So.2d 1260 (Fla. 1985); Tanzi v. State, 964 So.2d 106 (Fla. 2007)*

Defendant's Arguments in Support of Mitigating Circumstances

Counsel argues that Marvin Coleman mentally, emotionally, and physically abused Defendant from the age of 5 to the age of 17 when he moved out of the house. He belittled him constantly, apparently because he was not his biological child. He told him he would never be anything. He told him he could beat him; that he would never be a man, and that he would end up in jail someday. He was alcoholic and used marijuana. He abused the entire family, and also sexually abused Defendant's sister Crystal. He never showed affection to any of the children.

Counsel further argues that the mental health experts uniformly found Defendant severely impaired by methamphetamine abuse, and explained that continued use of the drug causes more dramatic dysfunction, deterioration and psychosis. Dr. Maher testified that use of the drug results in poor impulse control, and inability to make sound decisions. He opined that Defendant suffered periods of psychosis because of the drug abuse.

Dr. Maher relied on Dr. Wood's findings, which show abnormal glucose underutilization. He also described that the 25 point difference between Defendant's verbal IQ and performance IQ demonstrates abnormal brain functioning. He diagnosed Defendant with chronic depression and obsessive pattern of sexual interest. Ultimately, he opined that Defendant's ability to conform his behavior to the requirements of the law was substantially impaired.

Dr. McClain also diagnosed Defendant to have a substance dependence, recurring major depression, and cognitive disorder. She further found him to have impaired impulse control. As to the date of the murder, she opined that his capacity to conform his conduct to the requirements of the law was substantially impaired, and that methamphetamine use would render him more impulsive.

Dr. Taylor likewise diagnosed Defendant with substance abuse dependence, a learning disability, and sexual sadism. He opined that his ability to conform his conduct to the requirements of the law with respect to the sexual battery was substantially impaired, and, that he was not a sociopath or psychopath.

Defendant had no control over his childhood and no control over his genetic predisposition. He had no history of violent behavior toward anyone other than his wife.

Defendant argues that the mitigating circumstances outweigh the aggravating circumstances, and that the Court should impose a life sentence.

Defendant attempted to lead a productive life without drug abuse. He sought help from Reverend Hess and Pastor Jackson.

Defendant is a hard and good worker and craftsman as attested by Seven Alvord and Mr. Burt.

Defendant is a good father and spent a good deal of time with them.

Those who knew him, including Mr. Harden, Pastor Jackson, and Mrs. Coleman, described how out of character this conduct is for Defendant.

Defendant felt and exhibited remorse for his conduct, as attested to by Mr. Rabeau and others. Defendant confessed to Detective Losat, during which he showed remorse. He also attempted to turn himself in to authorities, and agreed to accompany detectives

from his mother's home to the station house, though not under arrest at the time.

Analysis and Findings

Any aggravating circumstance must be proved beyond a reasonable doubt. A jury or judge need only be reasonably convinced that a mitigating circumstance is established.

Proposed Aggravating Circumstances

Pecuniary Gain

The evidence does not convince the Court beyond a reasonable doubt that Defendant committed the homicide for pecuniary gain. The evidence demonstrates that he took the victim's car, after he committed the sexual battery and homicide, not primarily to appropriate it for his own use, but to remove it from the scene of the crimes to prevent him from being discovered. The evidence certainly does not establish that his reason for killing Ms. Radfar was an integral step to obtain the sought-after gain of stealing her car or any other property. *Hardwick v. State, 521 So.2d 1071 (Fla. 1988).*

The Court will not weigh this proposed aggravating circumstance.

Witness Elimination

The evidence does not convince the Court beyond a reasonable doubt that the Defendant committed the homicide to avoid lawful arrest or to eliminate the only witness to the sexual battery or burglary or theft. The circumstantial evidence creates a strong inference of this aggravating circumstance, but it does not establish beyond a reasonable doubt, that the Defendant killed Ms. Radfar because after he sexually battered her, she would be able to identify him as her assailant. The evidence of what transpired inside the victim's home with respect to the killing and other offenses comes only from Defendant's statement to the detectives. Nothing in his statement provides such a reason, or any reason, for the homicide. The evidence

does not establish that the sole or dominant motive for the murder was the elimination of Ms. Radfar as a witness. Speculation cannot support this aggravating circumstance. *Urbin v. State, 714 So.2d 411 (Fla. 1998), Hurst v. State, 819 So.2d 689 (Fla. 2002)*.

The Court will not weigh this proposed aggravating circumstance.

Cold, Calculated, and Premeditated

The evidence does not convince the Court beyond a reasonable doubt that the murder was cold, calculated, and premeditated, without any pretense of any legal or moral justification. The evidence supports a felony (sexual battery) murder as well as a premeditated murder – that he made a conscious decision to murder Ms. Radfar after he sexually assaulted her. It does not, however, support the required finding of heightened premeditation, defined as "deliberate ruthlessness." *Fennie v. State, 648 So.2d 95 (Fla. 1994); Walls v. State, 641 So.2d 381 (Fla. 1994); Buzia v. State, 926 So.2d 1203 (Fla. 2006).*

The Court will not weigh this proposed aggravating circumstance.

During Course of Committing Sexual Battery

The evidence convinces the Court beyond a reasonable doubt that the Defendant committed the homicide in the course of committing sexual battery, to which he admitted and to which he pled guilty. Defendant's guilty plea, coupled with the other evidence, demonstrates, beyond a reasonable doubt, that he sexually assaulted the victim with force and against her will, and that he thereafter, as part of the continuing series of events, decided to strangle and smother her with a plastic bag, ligatures, and his bare hands.

The Court will not consider that he committed the murder in the course of committing a burglary or theft to support this aggravating circumstance. The State's evidence of entering the residence with intent to

commit a crime therein is circumstantial as to its theory that he entered surreptitiously through a rear window or with a key, or is limited to the Defendant's statement to detectives that he entered the residence with the victim's permission, with intent to commit a crime, or remained in the residence after he decided to commit sexual battery

The evidence supports both premeditated murder and felony (sexual battery) murder. *Taylor v. State, 638 So.2d 30 (Fla. 1994); Blanco v. State, 706 So.2d 7 (Fla. 1997)*.

The Court accords great weight to this aggravating circumstance.

Heinous, Atrocious, or Cruel

The evidence convinces the Court beyond a reasonable doubt that the Defendant committed the homicide in a heinous, atrocious, and cruel manner. Ms. Radfar was conscious when Defendant sexually assaulted her using force and restraint, during which he choked and strangled her to the point of unconsciousness; was conscious or regained consciousness after he sexually battered her, and was conscious when she attempted to get out of the house, and was conscious when he further restrained her and strangled and smothered her with the plastic bag, ligatures, and his hands. The evidence, and common sense inferences from the evidence, establishes that the victim endured the Defendant's violence for several minutes, during which time she was certainly aware she was going to die. *Sochor v. State, 580 So.2d 595 (Fla. 1991); Orme v. State, 677 So.2d 258 (Fla. 1996); Bowles v. State, 804 So.2d 1173 (Fla. 2001); Blackwood v. State, 777 So.2d 399 (Fla. 2000); Overton v. State, 801 So.2d 877 (Fla. 2001)*

The Court accords great weight to this aggravating circumstance.

Proposed Mitigating Circumstances

The Court is reasonably convinced that all evidence offered in mitigation has been established, and will accord it appropriate weight as follows. The Court further determines that nothing in the State's evidence, not in its case in chief, or in its rebuttal case, rebuts, contradicts, or impeaches any evidence in mitigation. Defendant cites *Campbell v. State, 571 So.2d 415 (Fla. 1990); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Ford v. State, 802 So.2d 1121 (Fla. 2001); Coday v. State, 946 So.2d 988 (Fla. 2006); Kramer v. State, 619 So.2d 274 (Fla. 1993).*

Initially, the Court finds that the evidence offered in mitigation and in aggravation, through both direct and cross examination of the witnesses, and the defense exhibits, established the following statutory enumerated and non-enumerated mitigating circumstances, which the Court will consider and to which it will accord its weight and importance as indicated below.

Weighing

On 1 July 2004 Defendant was and had been for many months, using unlawful substances, primarily methamphetamine. He went to the victim's home and entered with her consent, ostensibly for the purpose of taking photographs of some tile work he had done in her house when he and his wife lived in that home several months before. The best evidence of what he then did comes from his pre-arrest statements and admissions to Detectives Esquinaldo and Losat. The evidence is that he grabbed her and forcibly sexually assaulted her. He did not use a condom and he ejaculated. In the process he placed a sock in her mouth. He then choked her and left her on her bed, believing she was dead or not conscious. While he was then looking around the house, she regained consciousness and attempted to leave the house. He grabbed her and took her back to the bed and strangled and suffocated her using his hands, a plastic bag over her head, and ligatures – a stocking, an electrical cord, and a dog leash - around her neck. She was

conscious for some period of time and was obviously aware she was going to die, but she did not die immediately. She "hiccupped" while he placed her body in the bath tub and opened the shower on her. The cause of death was strangulation and suffocation. She could have remained conscious for as little as seven to fourteen seconds, and possibly more. She endured being violently sexually assaulted, being strangled to a state of unconsciousness, then regained consciousness, then was strangled again, to her death. Defendant killed Ms. Radfar without conscience, and without pity. The homicide was extremely torturous to the victim. She must have experienced fear and terror knowing she was going to die. The homicide was heinous, was atrocious, and was cruel. The Court places great weight on the conduct and manner of the sexual assault and the strangulation killing.

Defendant over the next several hours thereafter did things to conceal his crimes, including wiping areas to remove his finger prints, cleaning the room with cleansing materials, and taking her car from the area and abandoning it several blocks away. His conduct after the crimes however does not establish any facet of any aggravating circumstance.

Defendant in July, 2004 was 39 years of age, married, and had two sons. From the age of 5 until the age of 17 when he left his parents' home, his step father severely abused him emotionally, psychologically, and to a lesser extent, physically. He lived in that home with his step brother and sister. The step father also physically abused Defendant's mother and he sexually abused the sister. The step father was an alcoholic and an evil person to the children.

He later attended a bible school where he met his wife. He had been a religious person and wanted at one time to become a minister. He and his wife to be left the school, married, and had children. At some time during the marriage, Defendant began to abuse drugs, including marijuana, cocaine, and methamphetamine, and became dependent or addicted.

He is diagnosed with chemical dependence and has symptoms of attention deficit disorder. More significantly, he is diagnosed with having a sexual obsessive disorder, or sexual sadism. This led to the sex games or fantasies in which he engaged with his wife, which included "assaulting" her and having "rough sex," much like his conduct with the victim of the homicide.

His diagnosed drug dependence and depression and childhood experiences led mental health experts to opine that because of these factors, his capacity to appreciate the criminality of his conduct, or to his capacity to conform his conduct to the requirements of the law was substantially impaired. He has a diminished ability to control his impulses.

He came to be a good and reliable worker and competent craftsman, and supported his family. He was a good father and husband. He has a reputation for nonviolence. Although Defendant has borderline verbal intelligence, he feels and has expressed genuine remorse for his actions. He attempted to turn himself in to the police the day after he killed the victim, and he cooperated with detectives when they went to his mother's home to interview him, and he ultimately confessed to the crimes. He later pled guilty to the murder and other charges, which dispensed with requiring the State to prove his guilt to a jury, and he waived his right to a jury advisory sentence.

The above are significant aspects of the Defendant's background and character, on which the Court places importance and weight, as indicated below.

1. *Charles G. Brant has no significant history of prior criminal activity.*
   The Court accords this circumstance little weight

2. *Defendant was emotionally, mentally, and physically abused by his stepfather from age 5 to 17; he has diminished intellectual function; he has diminished impulse control*

due to drug dependency, and as a result, his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. He has a diagnosed sexual obsessive disorder.
The Court accords these circumstances moderate weight

3. *Defendant at the time of the crime was 39 years old and had led a crime-free life.*
The Court accords this circumstance little weight

4. *Defendant is remorseful, and expressed his remorse when initially interviewed, and has expressed his remorse to other persons since his arrest.*
The Court accords this circumstance little weight

5. *Defendant cooperated with law enforcement officers when approached at his mother's home. He voluntarily accompanied detectives, while not under arrest, to a station house for questioning. He admitted the crimes when questioned. He later pled guilty to all crimes and did not require the State to prove the charges to a jury beyond a reasonable doubt. He then waived his right to a jury penalty recommendation.*
The Court accords these circumstances moderate weight

6. *Defendant has borderline verbal intelligence.*
The Court accords this circumstance little weight

7. *Defendant has a family history of mental illness.*
The Court accords this circumstance little weight

8. *Defendant is not a sociopath or a psychopath, and does not have an antisocial personality disorder.*
The Court accords this circumstance little weight

9. *Defendant has diminished impulse control and is not able to make sound decisions because of his methamphetamine abuse, and exhibits periods of psychosis. Defendant has recognized his drug dependence problem and has sought help. Defendant used methamphetamine before, during, and after the murder and other crimes.*
The Court accords these circumstances moderate weight

10. *Defendant is diagnosed with chemical dependence, sexual obsessive disorder, and has symptoms of attention deficit disorder.*
The Court accords this circumstance moderate weight

11. *Defendant is a good father. He encourages his sons to do well and expresses to them his interest in their welfare and how they are doing. His children, now ages 9 and 12, who he has not seen since 2004, responded favorably to him during the trial, and have written letters to him.*
The Court accords this circumstance little weight

12. *Defendant is a good worker and craftsman.*
The Court accords this circumstance little weight

13. *Defendant has a reputation of being a non-violent person.*
The Court accords this circumstance little weight

Sentence

The Court has considered and weighed the aggravating and mitigating circumstances, and concludes and determines that sufficient aggravating circumstances exist to support and warrant a sentence of death, and that the mitigating circumstances do not outweigh the aggravating circumstances. The Court will impose sentences as follows:

As to count one for the first degree murder of Sara Radfar, the Court imposes a sentence of death.

As to count two for the sexual battery of Sara Radfar, the Court imposes a sentence of life imprisonment, concurrently with count one.

As to count three for the kidnap of Sara Radfar, the Court imposes a sentence of life imprisonment, to be served concurrently with counts one and two.

As to count four for grand theft motor vehicle, the Court imposes a sentence of five years imprisonment, concurrently with counts one, two, and three.

As to count five for the burglary of dwelling with assault the Court imposes a sentence of life imprisonment, concurrently with counts one, two, three, and four.

(V4/701-741) (e.s.)

SUMMARY OF THE ARGUMENT

The death sentence imposed in this case is proportionate. On the morning of July 1, 2004, Charles Brant's [then] wife, Melissa woke up Brant, insisted that he had to stop his violent sexual attacks, and she threatened to contact the police. That night, after his wife and sons went to a movie, Brant went to the home of his 21-year-old neighbor, Sara Radfar, where he raped and brutally murdered her. After Brant sexually battered, choked, and tried to suffocate Sara, she was still conscious or regained consciousness. Sara tried to run out of the house, but Brant captured her and then brutally killed her. During the violent attack, Brant gagged Sara with a sock, covered her head with a plastic bag, and wrapped multiple ligatures -– including a stocking, an electric cord to a heating pad, and a leather dog leash –- around her neck. In sum, Brant gagged her, raped her, choked her, suffocated her, and then strangled her again. She "hiccupped" when he dumped her small 5'1" body into the bathtub.

When Brant's wife and sons returned home from the movie around 11:00 p.m., Brant was at home, washing dishes and cleaning the kitchen. According to his wife, Brant acted "nice," he did not act suspiciously, he did not appear to be under the influence of alcohol, although he was "speedy" and

fidgeting." Brant asked his wife to give him a close haircut and they snuggled on the couch and then went to bed together.

In imposing the death sentence, the trial court gave great weight to the aggravating factors of HAC and that the murder was committed during the course of a sexual battery.[1] The trial court's comprehensive sentencing order painstakingly addressed all of the mitigating factors and evaluated the weight accorded each. This Court has found death to be the appropriate penalty in other cases involving similar aggravating and multiple mitigating circumstances, including mental health mitigation.[2]

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[1] The HAC aggravator is among the weightiest in the statutory scheme. See, Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). And the "murder in the course of a felony" aggravator is especially significant here because it relies on the undisputedly violent sexual battery.

[2] See, Johnson v. State, 969 So. 2d 938, 960 (Fla. 2007) (murder committed by manual and ligature strangulation; death sentence proportionate where aggravators were murder during commission of a sexual battery or kidnapping or both, HAC, and committed while on felony community control; and seven non-statutory mitigating factors included history of extensive drug and alcohol abuse); Conahan v. State, 844 So. 2d 629 (Fla. 2003) (death sentence proportionate where victim was strangled with a ligature and aggravators were HAC, during course of kidnapping, and CCP, and four non-statutory mitigating factors related to defendant's relationships and character); Hauser v. State, 701 So. 2d 329 (Fla. 1997) (death sentence proportionate where the victim was strangled and aggravators were HAC, CCP, and pecuniary gain balanced against one statutory mitigator and four non-statutory mitigators, including being under the influence of drugs or alcohol at the time of the murder and a long history of mental health problems).

ARGUMENT

ISSUE I

BRANT'S DEATH SENTENCE IS PROPORTIONATE

The Appellant/Defendant, Charles Brant, asserts that his sentence is not proportionate. As the following will establish, a review of the facts of this case as compared to similar cases, establishes that the death sentence was properly imposed and is proportionate.

Legal Standards

Proportionality review "is not a comparison between the number of aggravating and mitigating circumstances." Schoenwetter v. State, 931 So. 2d 857, 875 (Fla. 2006). Rather, to determine whether death is a proportionate penalty, this Court must consider the totality of the circumstances of the case and compare the case with other similar capital cases where a death sentence was imposed. See, Boyd v. State, 910 So. 2d 167, 193 (Fla. 2005); Troy v. State, 948 So. 2d 635 (Fla. 2006); Simmons v. State, 934 So. 2d 1100 (Fla. 2006).

Facts

The trial court's comprehensive sentencing order set forth the following summary of the facts:

> The factual basis recited by the prosecutor during the 25 May 2007 guilty plea, to which Defendant conceded, demonstrated that:

The Defendant lived in a house close to Ms Radfar’s residence, and that at some time prior, he and his wife lived in that same apartment. On 1 July 2004 in the evening hours while his wife and children were at a movie, Defendant went to Ms Radfar’s residence and managed to get inside where he killed Ms Radfar by strangulation and suffocation. He used his hands, a plastic bag, a dog leash, an electrical cord, and stockings.

Law enforcement officers found Ms Radfar’s naked body in her shower with the water pouring over her body. Vaginal swabs showed Defendant’s DNA in the collected semen.

Law enforcement officers questioned Defendant on 4 July 2004 and he admitted having vaginal intercourse with Ms Radfar; that he entered her residence because he wanted to take photographs of tile work he had done to the apartment; that when she came out of the bathroom he grabbed her and threw her on a bed and raped her without her consent, and that she resisted by words and acts.

The Defendant forcibly, secretly, and by threat, confined and abducted and imprisoned the victim with intent to inflict bodily harm and to terrorize her. At a time when he thought the victim was dead and while searching the residence, the victim got up and attempted to go out the door. He grabbed her, took her back to the bedroom and suffocated and choked her to death. He put her body in the bathroom and under the shower in an effort to clean her up. She was hiccupping.

When law enforcement officers entered her residence, they found cleaning materials, and later found her Bronco vehicle near the residence The Defendant assaulted and battered the victim in her residence, which he entered under the pretense of taking pictures of tile work.

> After killing Ms Radfar, Defendant went home and asked his wife to cut his hair. Law enforcement officers searched Defendant's garbage and found incriminating items of evidence, including the victim's car and house keys, and the victim's debit card.
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> Defendant returned to the victim's residence the following day to clean up, and avoided being detected by law enforcement officers by going out the back door when they arrived at the scene.
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> Defendant initially gave untruthful statements to investigators, including that he had seen a person leaving the scene of the offenses.

(V4/R703-704)

Upon imposing the death sentence in this case, the trial court found the following substantial aggravating factors established beyond a reasonable doubt: (1) heinous, atrocious, or cruel (HAC) and (2) murder committed during the course of a sexual battery. As to the aggravating factor of murder committed during the course of sexual battery, the trial court concluded:

> The evidence convinces the Court beyond a reasonable doubt that the Defendant committed the homicide in the course of committing sexual battery, to which he admitted and to which he pled guilty. Defendant's guilty plea, coupled with the other evidence, demonstrates, beyond a reasonable doubt, that he sexually assaulted the victim with force and against her will, and that he thereafter, as part of the continuing series of events, decided to strangle and smother her with a plastic bag, ligatures, and his bare hands.
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> (V4/R734)

And, as to the weighty HAC aggravator:

> The evidence convinces the Court beyond a reasonable doubt that the Defendant committed the homicide in a heinous, atrocious, and cruel manner. Ms. Radfar was conscious when Defendant sexually assaulted her using force and restraint, during which he choked and strangled her to the point of unconsciousness; was conscious or regained consciousness after he sexually battered her, and was conscious when she attempted to get out of the house, and was conscious when he further restrained her and strangled and smothered her with the plastic bag, ligatures, and his hands. The evidence, and common sense inferences from the evidence, establishes that the victim endured the Defendant's violence for several minutes, during which time she was certainly aware she was going to die.
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> (V4/735)

In evaluating these aggravating factors, which were accorded great weight, against the various mitigating factors, accorded little to moderate weight, the trial court painstakingly explained:

Weighing

> On 1 July 2004 Defendant was and had been for many months, using unlawful substances, primarily methamphetamine. He went to the victim's home and entered with her consent, ostensibly for the purpose of taking photographs of some tile work he had done in her house when he and his wife lived in that home several months before. The best evidence of what he then did comes from his pre-arrest statements and admissions to Detectives Esquinaldo and Losat. The evidence is that he grabbed her and forcibly sexually assaulted her. He did not use a condom and he ejaculated. In the process he placed a sock in her mouth. He then choked her and left her on her bed, believing she was dead or not conscious. While he was

then looking around the house, she regained consciousness and attempted to leave the house. He grabbed her and took her back to the bed and strangled and suffocated her using his hands, a plastic bag over her head, and ligatures — a stocking, an electrical cord, and a dog leash - around her neck. She was conscious for some period of time and was obviously aware she was going to die, but she did not die immediately. She "hiccupped" while he placed her body in the bath tub and opened the shower on her. The cause of death was strangulation and suffocation. She could have remained conscious for as little as seven to fourteen seconds, and possibly more. She endured being violently sexually assaulted, being strangled to a state of unconsciousness, then regained consciousness, then was strangled again, to her death. Defendant killed Ms. Radfar without conscience, and without pity. The homicide was extremely torturous to the victim. She must have experienced fear and terror knowing she was going to die. The homicide was heinous, was atrocious, and was cruel. The Court places great weight on the conduct and manner of the sexual assault and the strangulation killing.

Defendant over the next several hours thereafter did things to conceal his crimes, including wiping areas to remove his finger prints, cleaning the room with cleansing materials, and taking her car from the area and abandoning it several blocks away. His conduct after the crimes however does not establish any facet of any aggravating circumstance.

Defendant in July, 2004 was 39 years of age, married, and had two sons. From the age of 5 until the age of 17 when he left his parents' home, his step father severely abused him emotionally, psychologically, and to a lesser extent, physically. He lived in that home with his step brother and sister. The step father also physically abused Defendant's mother and he sexually abused the sister. The step father was an alcoholic and an evil person to the children.

He later attended a bible school where he met his wife. He had been a religious person and wanted at one

time to become a minister. He and his wife to be left the school, married, and had children. At some time during the marriage, Defendant began to abuse drugs, including marijuana, cocaine, and methamphetamine, and became dependent or addicted.

He is diagnosed with chemical dependence and has symptoms of attention deficit disorder. More significantly, he is diagnosed with having a sexual obsessive disorder, or sexual sadism. This led to the sex games or fantasies in which he engaged with his wife, which included "assaulting" her and having "rough sex," much like his conduct with the victim of the homicide.

His diagnosed drug dependence and depression and childhood experiences led mental health experts to opine that because of these factors, his capacity to appreciate the criminality of his conduct, or to his capacity to conform his conduct to the requirements of the law was substantially impaired. He has a diminished ability to control his impulses.

He came to be a good and reliable worker and competent craftsman, and supported his family. He was a good father and husband. He has a reputation for nonviolence. Although Defendant has borderline verbal intelligence, he feels and has expressed genuine remorse for his actions. He attempted to turn himself in to the police the day after he killed the victim, and he cooperated with detectives when they went to his mother's home to interview him, and he ultimately confessed to the crimes. He later pled guilty to the murder and other charges, which dispensed with requiring the State to prove his guilt to a jury, and he waived his right to a jury advisory sentence.

The above are significant aspects of the Defendant's background and character, on which the Court places importance and weight, as indicated below.

1. Charles G. Brant has no significant history of prior criminal activity.

The Court accords this circumstance little weight

2. *Defendant was emotionally, mentally, and physically abused by his stepfather from age 5 to 17; he has diminished intellectual function; he has diminished impulse control due to drug dependency, and as a result, his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. He has a diagnosed sexual obsessive disorder.*
The Court accords these circumstances moderate weight

3. *Defendant at the time of the crime was 39 years old and had led a crime-free life.*
The Court accords this circumstance little weight

4. *Defendant is remorseful, and expressed his remorse when initially interviewed, and has expressed his remorse to other persons since his arrest.*
The Court accords this circumstance little weight

5. *Defendant cooperated with law enforcement officers when approached at his mother's home. He voluntarily accompanied detectives, while not under arrest, to a station house for questioning. He admitted the crimes when questioned. He later pled guilty to all crimes and did not require the State to prove the charges to a jury beyond a reasonable doubt. He then waived his right to a jury penalty recommendation.*
The Court accords these circumstances moderate weight

6. *Defendant has borderline verbal intelligence.*
The Court accords this circumstance little weight

7. *Defendant has a family history of mental illness.*
The Court accords this circumstance little weight

8. *Defendant is not a sociopath or a psychopath, and does not have an antisocial personality disorder.*
The Court accords this circumstance little weight

9. *Defendant has diminished impulse control and is not able to make sound decisions because of his methamphetamine abuse, and exhibits periods of psychosis. Defendant has recognized his drug dependence problem and has sought help. Defendant used methamphetamine before, during, and after the murder and other crimes.*
The Court accords these circumstances moderate weight

10. *Defendant is diagnosed with chemical dependence, sexual obsessive disorder, and has symptoms of attention deficit disorder.*
The Court accords this circumstance moderate weight

11. *Defendant is a good father. He encourages his sons to do well and expresses to them his interest in their welfare and how they are doing. His children, now ages 9 and 12, who he has not seen since 2004, responded favorably to him during the trial, and have written letters to him.*
The Court accords this circumstance little weight

12. *Defendant is a good worker and craftsman.*
The Court accords this circumstance little weight

13. *Defendant has a reputation of being a non-violent person.*

The Court accords this circumstance little weight

(V4/R736-740)

Analysis

In conducting proportionality review, this Court has stated that in the absence of demonstrated legal error, this Court will accept the trial court's findings on the aggravating and mitigating circumstances and consider the totality of the circumstances of the case in comparing it to other capital cases. Rodgers v. State, 948 So. 2d 655, 670 (Fla. 2006), citing, Kearse v. State, 770 So. 2d 1119, 1134 (Fla. 2000). In conducting its proportionality review, this Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated and (2) the least mitigated of murders. See, Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).[3]

The aggravators in the instant case were supported by substantial competent evidence and accorded great weight. Brant does not challenge the existence of these aggravators, but he argues that this case is not one of the most aggravated and not one of the least mitigated murders. However, this Court has

[3] In Almeida, this Court noted that the defendant did not commit his murders to get property from the victims; rather, he apparently acted impulsively in a drunken rage. 748 So. 2d at 932-33.

repeatedly emphasized that "HAC is among the weightiest in the statutory scheme." See, Johnson v. State, 969 So. 2d 938, 960 (Fla. 2007), citing Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). It "applies in physically and mentally torturous murders which can be exemplified by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Id., citing Barnhill v. State, 834 So. 2d 836, 849 (Fla. 2002); See also, Hoskins v. State, 965 So. 2d 1, 21 (Fla. 2007), citing Bowles, 804 So. 2d at 1178 ("Strangulation of a conscious murder victim evinces that the victim suffered through the extreme anxiety of impending death as well as the perpetrator's utter indifference to such torture"). Furthermore, in this case, as previously underscored in Johnson, "[t]he gravity of this [HAC] aggravator is magnified by its congruence with the aggravator of murder during a sexual battery. . ." See also, Williams v. State, 967 So. 2d 735, 762-763 (Fla. 2007) (noting that "the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony"); Huggins v. State, 889 So. 2d 743, 770 (Fla. 2004) (noting that this Court has consistently upheld the HAC aggravator for strangulation of a conscious victim).

As previously noted, the trial court did not find that any of the mitigation deserved great weight. This Court has summarized the proper standard to be used when reviewing a trial court's assessment of mitigation as follows:

> A trial court's decision regarding the weight to be assigned to a mitigating circumstance that it determines has been established is "within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard." Kearse v. State, 770 So. 2d 1119, 1133 (Fla. 2000); see also Trease, 768 So. 2d at 1055; Cole v. State, 701 So. 2d 845, 852 (Fla. 1997). Under the abuse of discretion standard, a trial court's ruling will be upheld unless the "judicial action is arbitrary, fanciful, or unreasonable, . . . [and] discretion is abused only where no reasonable [person] would take the view adopted by the trial court." Trease, 768 So. 2d at 1053 n.2 (quoting Huff v. State, 569 So. 2d 1247, 1249 (Fla. 1990)).
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> Reynolds v. State, 934 So. 2d 1128, 1143 (Fla. 2006)

The relative weight given each mitigating factor is within the province of the sentencing court. See, Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990). In this case, the trial court's thorough evaluation of each mitigating factor and application to the particular facts of this case is evident on the face of the 44-page sentencing order and, therefore, cannot be said to be fanciful or arbitrary. The trial court entered a fact-specific and detailed sentencing order outlining the evidence upon which the aggravating and mitigating circumstances were found. Although several mitigating factors were found,

they were, as determined by the trial court, accorded little to moderate weight. The trial court's findings and the weight given to the mitigating factors is both reasoned and supported. The trial judge correctly weighed the aggravators it found against the mitigators and no error has been shown. See, Rodgers, 948 So. 2d at 669; Hudson v. State, 992 So. 2d 96, 119 (Fla. 2008).

In Mansfield v. State, 758 So. 2d 636, 642, 647 (Fla. 2000), the death penalty was proportionate where the victim was sexually assaulted and strangled, and the trial court weighed two aggravating factors (HAC and the crime was committed during the commission of a sexual battery) and five non-statutory mitigators, including that the defendant had a poor upbringing and dysfunctional family, and suffered from a brain injury due to head trauma and alcoholism. In Johnson, 969 So. 2d at 960, the death sentence was upheld as proportional in a murder by strangulation case where the trial court gave some weight to non-statutory mitigation that Johnson suffered physical and emotional abuse by his father and sexual abuse by other family members. The trial court also gave moderate weight to non-statutory mitigation that Johnson had an extensive history of drug and alcohol abuse and was "under the influence of an excessive amount of alcohol" at the time of the murder. In

Johnson, this Court concluded that the death sentence was proportionate and also distinguished two of the cases which are now cited by Brant, including Voorhees v. State, 699 So. 2d 602 (Fla. 1997) and Sager v. State, 699 So. 2d 619 (Fla. 1997). As this Court explained in Johnson:

> We rely primarily on Douglas v. State, 878 So. 2d 1246 (Fla. 2004), and Orme v. State, 677 So. 2d 258 (Fla. 1996). In Douglas, the aggravators were HAC and murder committed during a sexual battery, balanced against a mitigator of no prior criminal history that was given little weight based on the defendant's drug activity. 878 So. 2d at 1262. There was less background mitigation than in this case: [A]lthough there was testimony that Douglas had trouble reading and was diagnosed with learning disabilities in the second grade, there was no evidence as to how or whether these learning disabilities affected him at or about the time of the murder. Further, no evidence was presented that Douglas suffered from any mental or emotional disturbance. Id. at 1263. Here, although the trial court concluded that Johnson's background did not reduce his culpability for the murder, Johnson's expert psychologist testified that the events of Johnson's childhood caused him to develop low frustration tolerance, impulsivity, depression, and anxiety. However, this case also involves the additional aggravator of murder committed while on felony community control and the conviction of kidnapping as additional support for the aggravator of murder in the course of a felony.
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> In Orme, this Court ruled a death sentence proportionate for a strangulation murder accompanied by a sexual battery and a robbery. The aggravators were sexual battery, HAC, and pecuniary gain. 677 So. 2d at 261. The Court rejected Orme's argument that death was disproportionate because his will was overborne by drug abuse and because the killing grew out of a "lover's quarrel": Orme paints a portrait of himself as a person rendered conscienceless by drugs.

But the State submitted competent substantial evidence that, despite his addiction, Orme was able to hold down a job and hide his drug abuse from his family. On the night of the murder he was able to drive a car without incident and talked in a normal manner with persons he encountered. Moreover, we decline to find that the instant homicide was a lover's quarrel. The argument supporting such a claim is simply too tenuous, resting primarily on a relationship with the victim that had ended. There is no evidence the murder was sparked by an emotional reaction to this breakup. Rather, competent substantial evidence shows this killing to be a strangulation murder designed to further both a sexual assault and a robbery, not a "lover's quarrel." Id. at 263. The trial court in Orme found both statutory mental mitigating factors and gave them some weight. Id. at 261.

We find distinguishable the cases cited by Johnson to argue that his death sentence is disproportionate. In Voorhees v. State, 699 So. 2d 602 (Fla. 1997), and Sager v. State, 699 So. 2d 619 (Fla. 1997), this Court reversed the death sentences of two defendants who beat and stabbed a man to death. Like this case, both death sentences rested on HAC and murder in the commission of a felony (robbery). Sager, 699 So. 2d at 621 n.1; Voorhees, 699 So. 2d at 606 n.1. However, unlike this case, no third aggravator applied. This Court grounded its reversals of the death sentences in part on the fact that the murder occurred at the conclusion of a drunken episode in which all three men were intoxicated. Additionally, we pointed out in Voorhees' favor that he suffered from alcoholism and in Sager's favor that he suffered from mental illness and that Voorhees was the leader. Sager, 699 So. 2d at 623; Voorhees, 699 So. 2d at 615.

Like Voorhees and Sager, the murder in this case occurred at the conclusion of a night of heavy drinking. However, in addition to the third aggravator present here and absent in Voorhees and Sager, the "murder in the course of a felony" aggravator is qualitatively more significant in that it rests on two grave violent crimes, sexual battery and kidnapping, rather than the single violent crime of robbery. In

> addition, Voorhees and Sager acted in tandem, and the trial court found the statutory accomplice mitigator for both defendants (albeit giving it very little weight in both cases). In contrast, Johnson did not have an accomplice in the murder of Hagin; Vitale assisted only in the cover-up. Qualitatively, the murder in this case is more aggravated and less mitigated than in Voorhees and Sager.
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> We conclude, based on our qualitative review of the basis underlying each aggravator and mitigator and comparison with similar cases, that death is a constitutionally proportionate punishment for Johnson.

Johnson, 969 So. 2d at 960

The additional cases which are relied upon by Brant are also distinguishable. In Cooper v. State, 739 So. 2d 82 (Fla. 1999), the important mitigators included the defendant's young age (18 at the time of the crime), abusive childhood, extensive mental health mitigation, brain damage, and Cooper's low intelligence (Cooper's test results placed him in the borderline retarded category). In Morgan v. State, 639 So. 2d 6 (Fla. 1994), the copious mitigation included brain damage and the defendant's youth. In Livingston v. State, 565 So. 2d 1288 (Fla. 1988), the death sentence was vacated for the shooting death of a store clerk where the substantial mitigation included severe childhood abuse and neglect, youth and immaturity based on age of 17, marginal intellectual functioning and extensive use of cocaine and marijuana. In Urbin v. State, 714 So. 2d 411 (Fla. 1998), the death sentence for robbery-murder was vacated

where the multiple aggravators were weighed against considerable mitigation which included impaired capacity, deprived childhood, and youth. In Crook v. State, 908 So. 2d 350, 359 (Fla. 2005), the mitigating evidence included a brutal childhood, substantial mental deficiencies, including organic brain damage, mental retardation, mental illness (paranoid schizophrenia), and his age of 20 at the time of the murder. Crook's case included expert testimony that his personality development was comparable to that of a three or four-year-old child. In Robertson v. State, 699 So. 2d 1343, 1347 (Fla. 1997), the mitigation included the defendant's age, impaired capacity, childhood abuse, and mental mitigation. In Nibert v. State, 574 So. 2d 1059, 1062-63 (Fla. 1990), the defendant suffered an abused childhood, extreme mental and emotional disturbance, and impaired capacity due to alcohol abuse; in addition, there was no evidence that Nibert went to the victim's house to kill. In Miller v. State, 373 So. 2d 882, 886 (Fla. 1979), the mental mitigation was substantial and related to the crime. In Mahn v. State, 714 So. 2d 391 (Fla. 1998), the defendant's "unrefuted, long-term substance abuse, chronic mental and emotional instability, and extreme passivity in the face of unremitting physical and mental abuse provided the essential link between his youthful age and immaturity which should have been

considered a mitigating factor." In Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993), the murder was described as "nothing more than a spontaneous fight, occurring for no discernible reason, between a disturbed alcoholic and a man who was legally drunk" and the mitigating factors included alcoholism, mental stress, severe loss of emotional control and both statutory mental mitigators. And, in Bell v. State, 841 So. 2d 329 (Fla. 2002), the defendant was 17 years old at the time of the crime.

In Lebron v. State, 982 So. 2d 649, 660 (Fla. 2008), this Court further distinguished several of the cases which are now cited by Brant and this Court explained:

> . . . the cases upon which Lebron relies in asserting that his death sentence is disproportionate are distinguishable. In Robertson v. State, 699 So. 2d 1343 (Fla. 1997), this Court held that a death sentence was disproportionate where the trial court found two aggravators (i.e., HAC and committed during the course of a burglary) and five mitigators (i.e., Robertson's age of nineteen, his abusive and deprived childhood, his history of mental illness, his borderline functional intelligence, and his impaired capacity at the time of the murder due to drug and alcohol use). See id. at 1345. This Court reasoned that notwithstanding the trial court assigning only "little weight" to the mitigation, a death sentence was disproportionate due to the "substantial mitigation." Id. at 1345, 1347. Unlike Robertson, the mitigation in the instant case is not substantial. As previously described, Lebron's age was not a mitigating circumstance, he did not have below-average intellectual ability, and he did not assert that he was impaired by drugs or alcohol when Oliver was murdered. Additionally, although there is some evidence that Lebron's mother may have used corporal

punishment, there is other evidence that established she was caring and "affectionate." Thus, the mitigation found by the trial court was of minimal value, while the aggravators were established by extensive, clear, and overwhelming evidence presented during the 2005 proceeding.

In Livingston v. State, 565 So. 2d 1288 (Fla. 1988), this Court held that a death sentence was disproportionate where the trial court found three aggravators (i.e., prior violent felony, committed during armed robbery, and committed to avoid or prevent arrest) and two mitigators (i.e., Livingston's age of seventeen and his "unfortunate home life and rearing"). Id. at 1292. This Court explained that Livingston suffered "severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him" and his intellectual functioning after these beatings was "marginal" at best. Id. (emphasis supplied). Additionally, there was evidence that Livingston extensively used cocaine and marijuana. See id. This mitigation is much more substantial than the mitigation established here. Unlike Livingston, the record does not establish that the physical violence toward Lebron was severe; Lebron's mother explained the conduct that existed in the context of "discipline." Additionally, as previously described, the trial court properly rejected age as mitigation in the instant case, and there was clear evidence that Lebron had the intellectual capacity to succeed academically. This case does not involve extensive drug use and is clearly distinguishable from Livingston.

In Urbin, this Court held a death sentence to be disproportionate where the trial court found three aggravators (i.e., prior violent felony, committed for purpose of preventing lawful arrest, and committed during commission of robbery and for pecuniary gain (merged)), and six mitigators (i.e., Urbin's age at the time of the crime, his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, absence of his father, drug and alcohol abuse, the imprisonment of his mother, his dyslexia, and his

> employment history). See 714 So. 2d at 415 n.2. This Court reasoned that Urbin's age and the fact that "Urbin's capacity to appreciate the criminality of his conduct was substantially impaired" were weighty mitigators. Id. at 417-18. Unlike Urbin, the trial court in the instant case did not find these two statutory mitigators. Thus, the imposition of the death sentence in the instant case is not disproportionate when compared to Urbin.
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> Accordingly, we conclude that Lebron's death sentence is proportionate to other capital cases in which a death sentence has been imposed.
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> Lebron, 982 So. 2d at 670

In addition, in Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), this Court held that the death sentence was disproportionate in connection with a shooting that occurred during what was described as probably a "robbery gone bad." And, in this case, unlike Terry, the aggravation is far greater due to the existence of the HAC aggravator. See e.g, Douglas v. State, 878 So. 2d 1246, 1262 (Fla. 2004) (noting that HAC is "one of the most serious aggravators in the statutory sentencing scheme"); Hutchinson v. State, 882 So. 2d 943, 963 (Fla. 2004) (a killing is inherently torturous where it involves a "strangulation or repeated stabbing of a conscious victim"); Johnston v. State, 841 So. 2d 349 (Fla. 2002) (death sentence proportional for sexual battery, beating, and strangulation of victim where aggravators included prior violent felony conviction and HAC); Blackwood v. State, 777 So. 2d 399 (Fla.

2000) (death sentence proportionate where victim struggled for her life during manual strangulation and trial court found one aggravating circumstance (HAC), one statutory mitigating circumstance, no significant history of prior criminal activity, and eight non-statutory mitigating circumstances).

Similarly, in Williams v. State, 967 So. 2d 735, 766-767 (Fla. 2007), the death sentence was proportionate where the trial court found the aggravators of (1) prior violent felony; (2) capital felony during commission of a sexual battery, and (3) HAC and the statutory and non-statutory mitigating factors were: (1) the capital felony was committed while Williams was under the influence of extreme mental or emotional disturbance, see § 921.141(6)(c), Fla. Stat.; (2) the capacity of Williams to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, see § 921.141(6)(f), Fla. Stat.; (3) Williams was a model prisoner in jail; (4) Williams attended religious services in jail; (5) Williams had a deprived childhood and had trouble finding work after previous convictions; (6) Williams was a loving person and a good brother; and (7) Williams was slight in stature, and was frequently beaten and robbed as a child. See also, Spencer v. State, 691 So. 2d 1062 (Fla. 1996) (death sentence proportionate for stabbing murder where the trial court

found two aggravating factors (prior violent felony and HAC), two statutory mitigating factors (extreme emotional disturbance and impaired capacity to appreciate criminality or conform conduct), and six non-statutory mitigating factors); Singleton v. State, 783 So. 2d 970 (Fla. 2001) (death sentence upheld where trial court found two aggravating factors (prior violent felony and HAC), three statutory mitigating factors (extreme emotional disturbance, impaired capacity to appreciate criminality or conform conduct, and age), and nine non-statutory mitigating factors (including drug use at the time of the offense).

In Tanzi v. State, 964 So. 2d 106, 120-121 (Fla. 2007), the victim was murdered by strangulation after a kidnapping, robbery, and carjacking. In finding Tanzi's death sentence proportional, this Court stated, in pertinent part:

> Under the totality of the circumstances, Tanzi's sentence is proportional in relation to other death sentences that this Court has upheld. See, e.g., Davis, 859 So. 2d 465 (finding death sentence proportional where three aggravators, including crime committed while on felony probation, HAC, and CCP, outweighed one statutory mitigator and four nonstatutory mitigators); Johnston v. State, 841 So. 2d 349 (Fla. 2002) (finding death sentence proportionate for sexual battery, beating, and strangulation where court found prior violent felony, murder in the course of a felony, pecuniary gain, and HAC aggravators); Blackwood v. State, 777 So. 2d 399 (Fla. 2000) (finding death sentence proportional for strangulation where court found HAC aggravator, one

> statutory mitigator, and eight nonstatutory mitigators); Mansfield v. State, 758 So. 2d 636 (Fla. 2000) (upholding death sentence where two aggravators, HAC and crime committed during the commission of a sexual battery, outweighed five nonstatutory mitigators); Hauser v. State, 701 So. 2d 329 (Fla. 1997) (finding death sentence proportionate where victim was strangled and trial court found three aggravators of HAC, CCP, and pecuniary gain, measured against one statutory mitigator and four nonstatutory mitigators). Accordingly, Tanzi's death sentence is proportional.
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> Tanzi, 964 So. 2d at 120-121

In Troy v. State, 948 So. 2d 635, 654-655 (Fla. 2006), the death sentence was proportionate in a case which included four aggravating factors, both statutory mental health mitigators (given moderate and considerable weight), and sixteen non-statutory mitigating factors.[4] In Boyd v. State, 910 So. 2d 167

[4] The non-statutory mitigating factors in Troy included: (1) Troy's dysfunctional family background (little weight); (2) Troy has many positive characteristics (little weight); (3) Troy was sexually molested as a teenager, testified in court, and was stigmatized in a small town (little weight); (4) Troy has a life-long history of severe substance abuse (little weight); (5) Troy has a life-long history of mental and emotional problems (little weight); (6) Troy adjusted well to the structured environment of prison, developed into an outstanding inmate, and behaved well in Sarasota County Jail and in the courtroom during the pendency of this case (little weight); (7) Troy cooperated with the police, fully confessed his guilt at the first opportunity, and offered to plead guilty on all charges (little weight); (8) Troy will remain incarcerated throughout the remainder of his life (little weight); (9) shortly before the offense, Troy had been released from incarceration after serving ten years, and experienced a difficult adjustment period (little weight); (10) Troy has three children, whom he cares for (little weight); (11) when arrested for crimes in the past, Troy has

(Fla. 2005), this Court held that the death penalty was proportionate where the trial court weighed two aggravating factors (HAC and murder committed while the defendant was committing or attempting to commit kidnapping and sexual battery) against one statutory mitigator (that the defendant had no significant prior criminal history, which the trial court afforded medium weight) and five non-statutory mitigators (including that the defendant came from a good family and showed remorse for his actions).

In the instant case, there are the substantial aggravating factors of (1) crime committed during the commission of sexual battery; and (2) the murder was especially heinous, atrocious or cruel (HAC). As previously emphasized, HAC applies to murders by strangulation of a conscious victim because a killing by this method is inherently torturous. See, Mansfield v. State, 758 So. 2d 636, 645 (Fla. 2000). This Court has found death to be the appropriate penalty in other cited cases involving similar

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cooperated with the police and confessed his guilt (little weight); (12) Troy is intelligent and he has obtained his GED (little weight); (13) Troy was previously confined longer than he should have been due to an illegal sentence (no weight); (14) Troy has shown some legal skills as demonstrated by his successful litigation of his illegal sentence (little weight); (15) Troy could assist corrections officers and other inmates if sentenced to life imprisonment (little weight); and (16) Troy has repeatedly expressed remorse for his conduct (little weight).

aggravating and mitigating circumstances, including Mansfield, 758 So. 2d at 645 (upholding death sentence where two aggravators, HAC and crime committed during the commission of a sexual battery, outweighed five non-statutory mitigators); Seibert v. State, 923 So. 2d 460 (Fla. 2006) (death penalty proportionate where the aggravating factors were (1) prior violent felony conviction and (2) HAC, and the non-statutory mitigating factors included: (1) Seibert was a nonviolent prisoner; (2) dysfunctional family background; (3) Seibert had a history of psychological problems; (4) he had a history of drug abuse; (5) Seibert was a good friend; and (6) his behavior in court was appropriate; Conahan v. State, 844 So. 2d 629 (Fla. 2003) (death sentence proportionate where victim was strangled with a ligature and trial court found aggravators of committed during course of kidnapping, CCP, and HAC and four non-statutory mitigating factors relating to defendant's relationships and character); Hauser v. State, 701 So. 2d 329 (Fla. 1997) (death sentence proportionate where the victim was strangled and the trial court found three aggravators of HAC, CCP, and pecuniary gain balanced against one statutory mitigator of no significant history of prior criminal activity and four nonstatutory mitigators, including being under the influence of drugs or alcohol at the time of the murder and a long history of mental

health problems); Mann v. State, 603 So. 2d 1141 (Fla. 1992) (upholding death sentence for murder where the trial court found the aggravating circumstances of prior violent felony, murder during the commission of a felony, and HAC and several non-statutory mitigating circumstances, including remorse); Frances v. State, 970 So. 2d 806, 821 (Fla. 2007) (death sentences proportionate to other murder cases involving multiple strangulation victims); Butler v. State, 842 So. 2d 817, 833 (Fla. 2003) (death sentence proportional for the first-degree murder conviction with only the single aggravator of HAC).

Moreover, as to the statutory mitigator of "age," this Court has previously noted that "[a]ge is simply a fact, every murderer has one. . . . However, if it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985).

In Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003), this Court upheld the death penalty as proportionate in a strangulation murder case with two aggravating factors (prior violent felony and HAC), one statutory mitigator (the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired), and 26 non-statutory mitigating

factors,[5] including a long history of mental illness. In upholding the death sentence in Johnston, this Court explained:

> Upon review, we find that the circumstances of this case are similar to other cases in which we have upheld the death penalty. See Johnston v. State, 841 So. 2d 349 (Fla. 2002) (holding the death sentence proportional for sexual battery, beating, and strangulation of victim where aggravators included prior violent felony conviction and HAC); Orme v. State, 677 So. 2d 258, 263 (Fla. 1996) (holding the death sentence proportional for the sexual battery,

[5] The 26 non-statutory mitigating factors in Johnston were: (1) defendant has a long history of mental illness; (2) defendant suffers from a dissociative disorder; (3) defendant suffers from seizure disorder and blackouts; (4) defendant did not plan to commit the offense in advance; (5) defendant's acts are closer to that of a man-child than that of a hard-blooded killer; (6) defendant is haunted by poor impulse control; (7) defendant is capable of strong, loving relationships; (8) defendant excels in a prison environment; (9) defendant could work and contribute while in prison; (10) defendant has extraordinary musical skills; (11) defendant obtained additional education while he was in prison; (12) defendant served in the U.S. Air Force and was honorably discharged; (13) defendant received a certificate of recognition from the Secretary of Defense for services rendered; (14) defendant excelled and was recommended for early termination while on parole; (15) defendant was a productive member of society after his release from prison; (16) defendant turned himself in to the police; (17) defendant demonstrated appropriate courtroom behavior during trial; (18) defendant has tried to conform his behavior to normal time after time; (19) defendant has a special bond with children; (20) defendant has the support of his mother, brother, and sister; (21) defendant has been a good son, brother, and uncle; (22) defendant has a mother, sister, three brothers, three nieces, and two nephews who love him very much; (23) defendant maintained a Florida driver's license; (24) defendant maintained credit cards and a bank account; (25) defendant can be sentenced to multiple consecutive life sentences and will die in prison; (26) the totality of the circumstances does not set this murder apart from the norm of other murders. Johnston, 863 So. 2d at 278

> beating, and strangulation of victim where aggravators included HAC, pecuniary gain, and sexual battery); Schwab v. State, 636 So. 2d 3, 7 (Fla. 1994) (holding the death sentence proportional for kidnapping, murder, and sexual battery of a boy where prior conviction of violent felony, murder in the course of a felony, and HAC were proven). Comparing the circumstances in this case to the cases cited above and other capital cases, we conclude that death is proportionate.
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> Johnston, 863 So. 2d at 286

See also, Conde v. State, 860 So. 2d 930 (Fla. 2003) (finding proportionality where female victim was stranger to defendant and strangled to death, and court found three aggravating factors, including HAC, and prior violent felony conviction, one statutory mitigating factor, and five non-statutory mitigating factors); Diaz v. State, 860 So. 2d 960 (Fla. 2003) (aggravators: CCP and prior violent felony; mitigation: both mental mitigators, age, lack of significant criminal history, remorse, and history of family violence).

This Court has consistently held that weighing the aggravating circumstances against the mitigating circumstances is the trial judge's responsibility and it is not this Court's "function to reweigh those factors." Bevel v. State, 983 So. 2d 505, 522 (Fla. 2008). Brant places substantial reliance on the testimony of psychiatric experts and alleged mental health mitigation. However, as this Court has stated with respect to

expert psychological evaluations, "expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case." Philmore v. State, 820 So. 2d 919, 936 (Fla. 2002).[6] "A trial court has broad discretion in determining the applicability of a particular mitigating

[6] Brant also argues that the aggravators and mental mitigation were "causally connected" to the crimes. Any alleged "causal connection" merely confirms that Brant's crimes were deliberate and calculated. Melissa [McKinney], the defendant's ex-wife, testified that she and Brant engaged in sex daily, and that once every two weeks he would force her into having rough sex. The last time they had sex was on June 30, 2004, the night before the murder. Ms. McKinney testified that Brant forced sex upon her and that the next morning she woke him up and threatened to report him to the police if he continued with the rough sex (intruder/rape) episodes. During the forced sex episodes, Brant would wear latex gloves and stuff a sock in her mouth. When Ms. McKinney was shown a dark sock recovered from the victim's bathtub and two pair of latex gloves recovered from the defendant's trash, she stated that those items resembled the items he used during their rough sex episodes. Although Brant claimed that he went to Sara Radfar's residence to take pictures of some tile work, the tile work was completed at least twelve months earlier. There was no evidence that Brant had a camera with him or that he actually had taken the photos of the tile. Brant declined to accompany his family to the movies on the night of the rape/murder and he did not tell his family about his plans to visit his neighbor to take photos of the tile. In addition, the evidence collected from the victim's and defendant's residences support the conclusion that Brant took the latex gloves, sock, stocking, and yellow raincoat with him. In sum, once Brant was told that he could no longer attack his wife, Brant went elsewhere to carry out his sexual sadist tendencies, and Brant decided to rape his neighbor in the same manner he used to attack his wife.

circumstance, and this Court will uphold the trial court's determination of the applicability of a mitigator when supported by competent substantial evidence." Id. In this case, the trial court considered all of the evidence presented and "trial courts are in the best position to observe the unique circumstances of a case and have broad discretion in assigning weight to mitigators." Boyd v. State, 910 So. 2d 167, 193 (Fla. 2005). See also, Hoskins v. State, 965 So. 2d 1, 17-18 (Fla. 2007) (affirming death sentence and stating, "the facts show an element of planning [and] are inconsistent with a claim that [the defendant] was under the influence of an extreme mental or emotional disturbance. . . . [Further,] there was no evidence that because of the frontal lobe impairment [the defendant] could not appreciate the criminality of his conduct at the time of the murder."). In rejecting the defendant's proportionality challenge in Hoskins, this Court noted:

> We find the sentence proportional to other death sentences this Court has upheld. See, e.g., Everett v. State, 893 So. 2d 1278, 1288 (Fla. 2004) (upholding a death sentence where the victim was beaten, raped, and then suffocated after having her neck broken where the trial court found three statutory aggravators -- (1) convicted felon under sentence of imprisonment; (2) commission during the course of a sexual battery or burglary; and (3) HAC - five statutory mitigators, and four nonstatutory mitigators), cert. denied, 544 U.S. 987, 125 S. Ct. 1865, 161 L. Ed. 2d 747 (2005); Douglas, 878 So. 2d at 1262-63 (upholding a death sentence where the victim was sexually battered and

> beaten and the trial court found two aggravators--HAC and commission during the course of a sexual battery--one statutory mitigator and sixteen nonstatutory mitigators); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003) (upholding a death sentence where the victim was sexually battered and strangled and the trial court found two aggravating factors--previous violent felony conviction and HAC--one statutory mitigator, and twenty-six nonstatutory mitigators); Belcher v. State, 851 So. 2d 678, 686 (Fla. 2003) (upholding a death sentence where victim was sexually assaulted and then strangled and drowned where the trial court found three aggravating factors--(1) previous violent felony conviction; (2) commission during the course of a sexual battery; and (3) HAC and fifteen nonstatutory mitigators).
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> Hoskins, 965 So. 2d at 22

As previously detailed, the trial court found two weighty aggravators[7] and considered all of the statutory and non-statutory mitigators advanced by the defense. The comprehensive,

[7] The State respectfully submits that the avoid arrest aggravator also applies to the instant murder. See, Howell v. State, 707 So. 2d 674 (Fla. 1998). In Willacy v. State, 696 So. 2d 693 (Fla. 1997), the defendant was confronted by the homeowner during his commission of a residential burglary. After binding the homeowner's hands and ankles, the defendant then killed the homeowner. This Court noted that since the homeowner no longer posed a threat to the defendant's escape, the evidence established that the dominant motive was to eliminate the only eyewitness. In this case, Sara Radfar knew and obviously could identify Brant. When she tried to escape, Brant captured her and then killed her in order to eliminate her as a witness. In addition, Brant's actions after the murder, such as cleaning the victim's body, cleaning the scene and removing physical evidence from the scene were continued evidence of his attempt to avoid detection. This Court may consider this aggravator on proportionality review. See Sliney v. State, 699 So. 2d 662 (Fla. 1997) (finding that even though trial court did not find HAC aggravator, this Court considered factor during proportionality review).

fact-specific sentencing order discusses each of the proffered mitigating circumstances, along with evidentiary support and the weight assigned. There is no indication that the trial court abused its discretion in assigning weight to the mitigators. See, Globe v. State, 877 So. 2d 663, 679 (Fla. 2004) (rejecting the argument that the trial court erred in affording "little" and "slight" weight to non-statutory mitigating factors); Nelson v. State, 850 So. 2d 514, 532 (Fla. 2003) (finding no merit in the claim that the trial court did not give enough weight to the fifteen non-statutory mitigators). It is not this Court's function to reweigh those factors, Hoskins, 965 So. 2d at 18-19; and Brant's death sentence for the brutal murder of Sara Radfar should be affirmed.

Lastly, although Brant does not challenge the sufficiency of the evidence or voluntariness of his plea, in Tanzi v. State, 964 So. 2d 106, 121 (Fla. 2007), this Court explained

> This Court reviews "the record of a death penalty case to determine whether the evidence is sufficient to support the murder conviction." Winkles v. State, 894 So. 2d 842, 847 (Fla. 2005). "However, '[w]hen a defendant has pled guilty to the charges resulting in a penalty of death, this Court's review shifts to the knowing, intelligent, and voluntary nature of that plea.'" Id. (quoting Lynch v. State, 841 So. 2d 362, 375 (Fla. 2003)).
>
> Tanzi, 964 So. 2d at 121

In this case, as in both Tanzi and Winkles v. State, 894 So. 2d 842 (Fla. 2005), Brant's pleas were knowing and voluntary. During the plea colloquy, Brant was placed under oath and he confirmed an understanding of the consequences of his plea, including an understanding that there was no agreement for his sentence and he could face the death penalty. (V4/R761; 763; 764; 785-786). The prosecutor recited a fact-specific, detailed factual basis and summarized the evidence against Brant. (V4/R769-782). Brant informed the Court that he had taken a medication prescribed for depression [Wellbutrin] at 3:00 "this morning," but it did not affect his ability to understand anything discussed in court that day. (V4/R782-783). Brant's trial attorneys both confirmed that they were able to communicate adequately with him. (V4/R783). The trial court also announced, "for the record, Mr. Brant appears to this Court to be very attentive and answering my questions very appropriately." (V4/R783). Brant further advised the court that he dropped out of school a month before graduation, he was able to read and write, and he had "never been treated" for any mental health issues. (V4/R783; 785). Brant confirmed that he was not promised anything in return and he was given an opportunity to ask any questions about "anything that's happened here this morning." (V4/R786). Here, as in Winkles v. State,

894 So. 2d 842, 847 (Fla. 2005), the trial court explained that the defendant was entitled to a jury trial and that the only sentencing options for first-degree murder were life or death. The trial court found "that there are sufficient facts, that the defendant has entered his plea knowingly and voluntarily on both counts, counsel with whom he is satisfied, there's sufficient factual basis and that his pleas are knowingly and intelligently entered." (V4/R787). The trial court's findings are supported by competent, substantial evidence in the record. In this case, as in Tanzi and Winkles, Brant voluntarily and knowingly entered his plea and the trial court properly accepted it.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the State respectfully requests that this Honorable Court affirm Appellant's convictions and sentences.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to John C. Fisher, Assistant Public Defender, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831-9000, this 31st day of December 2008.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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