IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-923

DAVID BYRON RUSS,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ANSWER BRIEF OF APPELLEE

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

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STATEMENT OF THE CASE

Appellant was indicted on the following charges for crimes which occurred on or between May 7 and 8, 2007:

(1) Count I-First degree premeditated murder of Madeleine Leinen;

(2) Count II-Kidnapping with a weapon;

(3) Count III-Carjacking with a deadly weapon;

(4) Count IV-Robbery with a deadly weapon;

(5) Count V-Burglary of a dwelling with an assault or battery.

(V1, R14.1-14.2).[1]

At his first appearance on June 10, 2007, Russ pled not guilty and was appointed a public defender. (V1, R19). On July 10, 2007, Russ was arraigned. (V11, R336-38). On September 12, 2007, Russ waived his right to speedy trial. (V11, R339-342). On October 11, 2007, a status hearing and pre-trial motions hearing were held. (V12, R343-420). On December 5, 2007, the trial court held a docket sounding and continued the case for trial. (V12, R421-424).

On February 6, 2008, Russ withdrew his not guilty pleas and pled guilty to the following Counts:

[1] Cites to the pleadings and hearings are by volume number, "V___," followed by "R___" and the page number. The penalty phase record begins anew with number "1." Cites to the penalty phase transcripts are by volume number, "V___," followed by "PP___" and the page number. Cites to the Supplemental record are "SRV ___," followed by "R ___."

Count One - First Degree Premeditated Murder;

Count Two - Kidnapping with a Deadly Weapon;

Count Three - Grand Theft Auto (charged in the indictment as carjacking);

Count Four - Robbery with a Deadly Weapon;

Count Five - Burglary with Assault or Battery.

(V12, R426-27). The trial judge conducted a complete plea colloquy and found Russ "was alert and intelligent." (V12, R428-48). Russ's plea "was freely and voluntarily made with knowledge of the consequences after advice of competent counsel with whom he says he's satisfied." (V12, R448).

The factual basis for the plea was:

> That on May 7th, 2007, the victim left her residence between seven-thirty and eight a.m. to travel to her employment as a receptionist for Dr. Emil Felski. The victim lived approximately eight miles from her employment and reported for work by eight-fifteen a.m., she was actually seen at her place of employment by another co-worker at that time and on that date of May 7, 2007.
>
> The victim left her employment roughly at four p.m. that day to go to an eye examination, and then she was last seen alive while she was shopping at the Sam's Club on 436 in Casselberry at five thirty-five p.m., she left that store. There is a surveillance video that shows the victim actually shopping in the store, actually coming into the store, actually leaving the store, and actually getting into her vehicle and driving away. And as I indicated, that was approximately five thirty-five p.m. on May 7th.
>
> The Sam's Club is approximately a twenty-five to thirty-five minute drive depending on the traffic from where – so it would take approximately that length of time to get between the Sam's store, Sam's Club and the defendant's (sic) residence on Leah Avenue in

Longwood, and this would put the victim back at her house anywhere between six and six-ten p.m. on May 7th, 2007.

While at the Sam's Club, the victim purchased some dry goods as well as refrigerated and frozen items. The crime scene photos that were taken from the, in this particular case, showed that the dry good were stacked neatly on some boxes in the garage, which were adjacent to where the victim would normally park her car, and that she had just purchased some items that were placed in the freezer, specifically, some frozen shrimp, and there was some other items, a package of cheese, and I think a package of some pigs ears for her, she had a couple of dogs, that were on the counter as well as the Sam's receipt.

The evidence would show that the defendant and the victim in this case did not know each other. That some time between eight a.m. and six or six-ten p.m. on May 7th, 2007, the defendant entered the victim's residence and he entered or remained at this residence without the consent of the victim.

At some point, the defendant tied the victim up in an interior bathroom with the victim's hands and feet bound and a rope was tied around the victim's neck.

According to the medical examiner, Marie Herrmann, the victim was beaten before she was killed. The medical examiner bases this opinion on the fact that the victim had a swollen eye, a laceration on her lip, a cracked tooth, and the victim had bit her tongue, she had a broken clavicle and two rib fractures. And the M.E.'s opinion is that all of these injuries were sustained while the victim was alive.

The M.E. also believes that the victim was tied up before she was killed, and this is based on the petechial hemorrhages that were observed, as well as the ligature marks around the victim's neck, as well as her hands. Apparently there was an intense discoloration of the victim's hands from the blood circulation that was cut off to her hands.

And the confinement of – the State will prove that the confinement of the victim by the defendant was for the purpose to facilitate the commission of a robbery or burglary, or with the intent to inflict bodily harm, or to terrorize the victim.

Additionally, the defendant armed himself with a knife during the commission of the kidnapping as evidenced by the multiple stab wounds to the victim's body, head and body.

The State would also prove that the defendant used threat, force, or violence directed towards Madeleine Leinen to take the victim's car, her jewelry and a Mastercard.

At approximately six-fifty p.m., on May 7th, 2007, the defendant was videotaped attempting to use the victim's Mastercard at a Fairwinds Credit Union that's located on 2143 Semoran Boulevard in Apopka. And it takes about twenty minutes from the victim's house to drive from her home to this Fairwinds Credit Union in Apopka. And I say attempted to use her Mastercard, the attempt was unsuccessful because an invalid PIN number was entered.

The defendant then left the state of Florida in the victim's vehicle and traveled to, ultimately traveled to Denton, Texas, and en route to Texas, the defendant stopped along the way and pawned the victim's jewelry in Alabama and Texas. And the victim's vehicle was discovered in Denton, Texas.

The State would prove that the victim's death was caused by the defendant from a premeditated design to effect the death of the victim. The medical examiner in this particular case is of the opinion that the ligature on the neck was enough to kill the victim.

In addition, the victim was stabbed four times, three to the back and one to the head.

One of the back wounds went through the victim's aorta and left lung. That injury alone is sufficient to kill the victim.

The two other back stabs went through the victim's right lung, one would be fatal and the other would be potentially fatal.

The stab wound to the head was a potentially fatal wound, although it did not penetrate skull.

(V12, R437-441). Russ stated that he agreed to the above facts. (V12, R441).

On April 9, 2008, Russ advised the trial court that he wanted to waive a jury for the penalty phase and waive the presentation of all mitigation. (SRV1, R623-27). The court re-scheduled the matter for the following week. (SRV1, R625).

At the April 14, 2008, hearing, Russ informed the trial court that he did not want to present any mitigation at the penalty phase. He did not want to drag the victim's family, his family, or anybody else through the mitigation testimony. (V12, R473). The trial court informed Russ that it was in both his and the State's best interest that the court be provided as much information as possible in order to determine an appropriate sentence for his crimes. (V12, R474). Russ maintained it was his desire that his attorneys did not present any mitigation. Russ's counsel assured the trial court they discussed options with Russ; i.e., presenting mitigation to a jury or presenting it only to the trial court. (V12, R476). The trial court urged Russ to reconsider and discuss the matter with his lawyers. (V12, R481).

At the April 30, 2008, hearing, Russ moved to waive both the jury for the penalty phase and the presentation of mitigation by his attorneys. (V12, R485). Trial counsel stated that a competency evaluation had been performed shortly after Russ's arrest, and "there's been no indication that he's not competent." (V12, R477, 486-87). The State did not object to Russ's waiver of the jury for the penalty phase. (V12, R487). The court ensured Russ was aware of the aggravators the State was seeking that supported a death sentence. (V12, R487-501). Russ wanted

to have current counsel represent him, with the understanding that no mitigation would be presented on his behalf. (V12, R504, 527-535). The trial court ordered a comprehensive presentence investigation ("PSI") to be completed by June 30, 2008. (V12, R535, 538).

On May 1, 2008, the trial court found Russ competent to waive the penalty phase jury and granted the request. The court also found Russ competent to waive the presentation of mitigation. (V13, R544, 545). The court appointed "special counsel," Michael Nielsen and Jeffrey Dowdy, to present mitigation. (V13, R546; 550, 552). Although Russ waived mitigation, Russ was still represented by the public defender's office. (V13, R552).

On May 14, 2008, Russ wrote a letter to the trial judge. He described his abusive childhood, drug abuse, head injuries, incarcerations, and his criminal behavior in the month and days prior to murdering Madeleine Leinen. (V2, R250-56).

At the August 7, 2008, hearing, special counsel Dowdy requested that Dr. Charles Golden, neuropsychologist, interview and evaluate Russ. Russ refused to be evaluated. (V13, R563-64). Russ also refused to undergo a PET scan. (V13, R567-68).

On August 27, 2008, the State filed its "Notice of Intent to Offer Evidence of Other Crimes, Wrongs or Acts" regarding Russ's criminal actions before and

after the murder of Madeleine Leinen. (V2, R211-13). On December 29, 2008, Russ filed a Motion *in Limine*. (V2, R229). Russ moved to prevent the State from offering evidence or testimony at the penalty phase related to:

1) Criminal activity that occurred in Texas after the murder of Madeleine Leinen;

2) Possession of cocaine on May 6, 2007;

3) Possession of drug paraphernalia on May 6, 2007;

4) Loitering or prowling on May 7, 2007.

(V2, R229). The trial court reserved ruling until the testimony was proffered at the penalty phase. (V10, PP16). The testimony of Jessica Steger, Brian Lee, and Bradley Tollas was proffered. (V10, PP18-55)[2]. After the proffer, the trial judge

[2] Proffers. Jessica Steger is a school teacher from Denton, Texas. She did not know Appellant. (V10, PP18, 31). On May 14, 2007, Steger, who lives alone, left her house at 7:00 a.m., and returned at 7:00 p.m. (V10, PP18-19). As Steger entered through the garage, she noticed the guest bedroom door was shut, which was not normal. She opened the door and saw the bed was "messed up." (V10, PP19). As she continued walking through the house, she heard the television blaring. The bedding in the master suite was out of place, now bundled under the window in her bathroom. The guest bathroom window was broken and the shower was wet. (V10, PP20, 23). A towel was hanging on the window sill that she knew had been in the dryer. She called 911. (V10, PP20).

Steger continued walking through the house. Pieces of duct tape were hanging on the desk next to her bed. A roll of duct tape was in the garage. (V10, PP21, 22). A knife from a butcher block in the kitchen now lay on the desk. A fan cord, fastened into a noose, was on the ironing board next to her bed. The fan was on a shelf in the garage. (V10, PP21, 22). Food was missing. An empty beer bottle, (that she had not consumed) was on the desk. (V10, PP22-3). Some of her brother's mail was lying opened on the floor. Dirty dishes had been washed. Cigarette ashes were on the living room floor. A cigarette butt was in the toilet.

heard argument. (V10, PP56-63). The judge excluded evidence regarding:

(a) Possession of cocaine and drug paraphernalia (V10, PP63);

(b) Fleeing and eluding a police officer (V10, PP65).

The judge reserved ruling as to the evidence regarding:

Steger did not smoke. She found a duffle bag under a bed, which was packed with some of her clothing, jewelry, medicine, and toiletry items. (V10, PP22). A second set of car keys to her car was missing. (V10, PP31).

The following day, Steger was told Appellant had allegedly committed a homicide the prior week in Seminole County, Florida. Further, it was possible he had been in her home. (V10, PP32). Appellant's palm print was identified on her washer/dryer, which was located near the broken window. (V10, PP33).

Detective Brian Lee, Denton, Texas, Police Department, assisted in processing the burglary scene at Steger's house. (V10, PP34, 37-38, 44). A palm print lifted and processed from Steger's washer/dryer was identified as belonging to Russ. (V10, PP39, 42).

Officer Bradley Tollas, Longwood Police Department, was patrolling an industrial area of Florida Central Parkway on May 6, 2007. (V10, PP45, 46). Tollas observed a white Jeep Cherokee on Bennett Drive, a place that had been burglarized several times within the last few months. (V10, PP46). The vehicle "looked out of place," and it was not one Tollas had previously noticed in the area. (V10, PP47). Tollas approached the Jeep and saw Russ reclining in the driver's seat. (V10, PP47-8). Tollas asked Russ if he was okay and identified himself as a police officer. (V10, PP48). He told Russ to roll down the driver's side window which Russ agreed to do. Tollas moved to the rear of the Jeep. Russ started the vehicle, put it in reverse, and back up several feet. Tollas told Russ to stop, and again identified himself as a police officer. The Jeep lunged forward through a grassy area and struck an irrigation pipe. (V10, PP49). Tollas radioed a vehicle pursuit call and followed Russ on Florida Central Parkway. (V10, PP49).

When Tollas caught up to Russ's vehicle, it was abandoned. (V10, PP50-1). Police searched for Russ in the area to no avail. (V10, PP51-2). The victim lived a block from this area. (V10, PP52). Officer Tollas filed an incident report. Russ was convicted for "fleeing and eluding, possession of cocaine, possession of drug paraphernalia, loitering, and prowling." (V10, PP53-4).

(a) The burglary in Denton, Texas (V10, PP65)[3];

(b) All other issues (V10, PP66).

The penalty phase was held January 8-9, 2009, before the Honorable Marlene Alva. (V10, PP1-200; V11, PP201-335).

The *Spencer*[4] Hearing was held January 15, 2009. (V13, R609-616). The parties filed sentencing memorandums. (V9, R1616-1637). Court-appointed mitigation counsel offered the following list of factors in mitigation:

1. The Defendant suffers from a long term severe addiction to illegal drugs.

2. The crimes of conviction were the result of a long history of drug abuse and a direct result of said addiction.

3. The Defendant was severely physically abused as a child by his father.

4. The Defendant was verbally abused as a child by his father.

5. The Defendant has the capacity to form and maintain loving relationships with family members, before and after incarceration.

6. The Defendant is a devoted brother.

7. The Defendant is a devoted son to his mother.

8. The Defendant suffers from multiple medical problems, including:

A. Thyroid condition.
B. Hepatitis C.

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[3] This evidence was admitted, but ultimately not considered. (V10, PP89; V9, R1648).

[4] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

C. Head trauma.
D. Severe headaches.
E. Vertigo.
F. Vision problems.
G. Dental problems.
H. Heart attack.
I. Allergies.
J. Kidney stones.
K. Chronic acid reflex.
L. Asthma.
M. Degenerative disc disease.

9. The Defendant has made numerous attempts to cure his drug addition by going to multiple drug rehabilitation programs.

10. The Defendant was spending $500-600/week on cocaine prior to the crimes of conviction.

11. The Defendant suffers from undiagnosed mental illness do to his physical abuse and drug use.

12. The Defendant has pled guilty to the crimes and accepted responsibility in this matter.

13. The Defendant has behaved appropriately in the courtroom.

14. The Defendant has obtained his high school G.E.D.

15. The Defendant has the trade skill of being a roofer.

16. The Defendant suffers from depression.

17. The Defendant has been taking prescription medicine while in custody which is very helpful for his mental health status.

18. The Defendant has been trained and educated in the field of drug abuse

19. The Defendant attended Western Texas College from 1994 to 1997 and had a cumulative GPA of 3.67.

20. The Defendant was accepted to attend school at Texas Tech University in Lubbock, Texas, on July 17,1997.

21. The Defendant was a member of the "Center For the Study of Addiction" which was run by Dr. Carl Anderson, Ph.D. at Texas Tech University.

22. The Defendant received a substance abuse studies scholarship for him to address his substance abuse addiction with Dr. Anderson on December 10, 1996.

23. The Defendant wrote a thank you note and kind words to Mr. Rushing of Lubbock, Texas, concerning his receipt of the scholarship in 1997.

24. The Defendant wrote a thank you letter and kind words to Mr. & Mrs. J. R. Jones of Albany, Texas, concerning his receipt of the substance abuse scholarship in 1998.

25. The Defendant was a father figure to the young son of his live-in girlfriend.

26. The Defendant would take the child, Tanner, fishing and help with his school work.

27. The Defendant carried an 80 year old woman from her car to the ocean so she could sit in a chair and fish.

28. The Defendant had a loving relationship with his girlfriend.

29. The Defendant does not want to put the victim's family members through the emotional process of the penalty phase proceedings.

30. The Defendant has been counseling children concerning criminal activity and the dangers of drug use while in custody at the county jail for roughly the last twelve months. That said counseling is part of a program run by the Sheriff's Office.

31. The Defendant has no violent criminal history.

(V9, R1616-1624).

On May 13, 2009, Appellant was sentenced to death for the murder of Madeleine Leinen. (V13, R617-622). The trial judge made detailed findings in a fifteen page sentencing order. (V9, R1640-1654). The following aggravating circumstances were found:

(1) Committed during a kidnapping: significant weight (V9, R1642-43);

(2) Pecuniary gain: moderate weight (V9, R1644);

(3) Heinous, atrocious, or cruel: great weight (V9, R1644-46);

(4) Cold, calculated, and premeditated: great weight (V9, R1646-47).

The following mitigating circumstances were considered:

(1) Abusive childhood: moderate weight (V9, R1648-49);

(2) Severe, long-tem drug addiction: some weight (V9, R1949-50);

(3) Remorse: moderate weight (V9, R1650);

(4) Multiple medical problems: very little weight (V9, R1651);

(5) Capacity to form and maintain loving relationships with both family and non-family members: little weight (V9, R1651);

(6) Pursued higher education and skilled in roofing trade: little weight (V9, R1652);

(7) No violent criminal history: little weight (V9, R1652);

(8) Appropriate courtroom behavior: little weight (V9, R1653);

(9) Wrote thank you notes to scholarship donors at Texas Tech University in 1997: little weight (V9, R1653).

The trial court found the aggravating factors outweighed the mitigating circumstances and sentenced Russ to death for the murder of Madeleine Leinen. (V9, R1653). Russ received concurrent life sentences for kidnapping with a weapon, robbery with a weapon, and burglary of a dwelling. He received a five-year prison term for grand theft of a motor vehicle. (V9, R1658-1665).

STATEMENT OF THE FACTS

At the commencement of the penalty phase, Russ re-confirmed that he did not want counsel objecting to any matters presented in aggravation and did not want any mitigation presented on his behalf. (V12, PP17).

Penalty phase testimony. Kimberly Williams is Russ's ex-girlfriend and best friends with Russ's sister. (V10, PP84, 85). For six months prior to the murder, Russ and Williams lived together with Williams' aunt and her son. (V10, PP86). Russ wrote her cards and letters both before and after he was arrested. (V10, PP86-7, 88). Williams recognized his writing "anywhere." (V10, PP87). She identified Russ's signature on the letter he wrote to the court. In that letter, he admitted guilt in both the homicide case and the Denton, Texas, burglary. (V10, PP87, 89, 90, State Exh. 2). In the letter, Russ described the murder as follows:[5]

[5] Letter is typed as written, including misspellings and corrections which Russ

> Longwood police officer shined a flashlight in my eyes through the dark tinted glass, awakening me.
>
> I wish I could tell you I don't remember this but I do. I remember most of what I did from this point on.
>
> I started my jeep and took off fleeing from the police officer. I was willing to do anything to continue getting high. I remember the police breaking their persuit due to my reckless speeds. I slid to a stop and absconded on foot. I ended up on someones roof next door to the victim. I watched law enforcement search for me. I watched them tow my jeep.
>
> I was in shorts and T-shirt and tennis shoes. It was cold, windy and misting out. I passed out on that roof top. At dawn I awakened. I saw the victim leaving for work. I choose my victim at that exact moment.
>
> I entered the home, showered, washed my clothes,, ate and went through the home very carefully. I packed all valuables, gold, cash, and what I believed to be a valid credit card pin number
>
> I awaited her return.
>
> Was the murder premeditated? Yes Your honor it was. Did I believe I was capable of such a crime while on a drug, crime spree. No I did not. I was no doubt a cold blooded killer on that day.
>
> I killed an innocent women who did not deserve to die. I got into her car with all the property I had packed and left. I went straight to her bank (Fair Winds) and attempted to withdraw monies from her account. I went straight to a crack neighborhood, purchases more crack and a pipe and left Florida. I pawned her jewelry from here to Texas while purchasing crack in different cities.

(V2, R253-55).

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identified with "s.o.".

Williams knew Russ had a history of drug use. However, he did not use drugs when they lived together. Williams said Russ "would not have been welcome in my home." (V10, PP93-4). Russ and her eighty-year old aunt had a good relationship. On occasion, he helped carry her aunt because she was in poor health.[6] (V10, PP94, 95). Russ was "the father that he's never had" to her son. (V10, PP95). Russ worked steadily and gave Williams his paycheck. (V10, PP96). He helped cook, clean, and wash laundry. (V10, PP97). Williams had no reason not to trust him. (V10, PP98). About a month before the murder, Russ started using crack cocaine. (V10, PP99). Williams said, "He was good before this." (V10, PP97).

Margaret Hughes worked for the victim in a medical office. She knew Madeleine Leinen since the 1980's and they were best friends. (V10, PP104-05). Around 2:00 p.m. on May 7, 2007, Hughes spoke with Leinen when the latter left work to go to a doctor's appointment. (V10, PP107). Hughes called Leinen several times later that evening and the following morning but could reach her. (V10, PP108, 109). Although Leinen lived alone, she had a dog. (V10, PP109, 110). Hughes became concerned when Leinen did not show up at work. Hughes called her husband, Richard, and asked him to check on Leinen. (V10, PP109, 118).

Richard Hughes went to Leinen's home on the morning of May 8, 2007.

[6] Williams described Russ as six foot one inch, two hundred sixty pounds. (V10, PP91).

(V10. PP117, 119). He knocked on the door and tried to look through the windows. "The blinds were closed tight." He thought Leinen might have fallen and needed help. He rattled the sliding glass door. Although a pin fell out he still could not open the door. He got a tire iron from his car and popped open the door. He hollered for Leinen. (V10, PP121-22). As Hughes looked throughout the house, he saw Leinen's dog had gone to the bathroom. "I knew right then there was something wrong because she would have never left that like that." (V10, PP122). He looked through all the rooms and found Leinen laying face down in the bathroom. (V10, PP122). Leinen's hands and legs were tied. (V10, PP123).

Hughes could not remember Leinen's address. He grabbed her phone and went into the garage to call 911. Leinen's Burgundy Toyota Camry was gone. (V10, PP123, 146). Hughes went outside, called 911, and reported Leinen's murder. (V10, PP124).

Investigator Robert Jaynes, Seminole County Sheriff's Office, responded to the crime scene. (V10, PP126). Inv. Jaynes walked through Leinen's home, which was very well kept. (V10, PP132-33, 163). There were no large amounts of blood in any of the rooms. Bloody footwear impressions were found in the garage. (V10, R164). Leinen was "restrained and forced into the bathroom" where she was killed. (V10, PP133, 165). A knife was missing from the butcher block in the kitchen. (V10, PP134). A Sam's Club receipt located on the kitchen counter top depicted a

date of May 7, with a time of 5:35 p.m. (V10, PP135-36). The purchased items listed on the receipt were found in Leinen's home or garage. (V10, PP137). A videotape obtained from Sam's Club showed Leinen walking in and out of the store. (V10, PP138, PP144-45, 146; State Exhibits 46-48). A videotape obtained from Fairwinds Credit Union showed Russ attempting to use Leinen's ATM card at 6:47 p.m.[7] (V10, PP138, 146-148, 157, State Exh. 49).[8]

Leinen was found on the floor of an interior bathroom which had no outside doors or windows. (V10, PP150, 155). Her hands were bound behind her back with nylon rope. There was a tear in her clothing "from a knife wound." (V10, PP156). There was a ligature around her neck and a knife wound under her bra strap. (V10, PP156, 157).

John Ohlson, crime scene analyst, documented the crime scene and collected evidence. (V10, PP169). He attended Leinen's autopsy and collected evidence. Ohlson collected the ligatures used to bind Leinen's hands and feet as well as the ligature around her neck. (V10, PP169-70, 173, 174, State Exhs. 87-89). The rope found around Leinen's neck had been fastened into a loop and the rest of the rope "was piled on her back." (V10, PP172). The rope around Leinen's neck and hands

[7] Russ's former girlfriend, Kimberly Williams, identified Russ in the bank video. (V10, PP147-48, 157).

[8] Due to the change to daylight savings time, there was a one-hour discrepancy in the printed hour. (V10, PP167-68).

appeared to be the same material. (V10, PP180-81). Rope similar to that binding the victim's neck and hands was not found at Leinen's home; however, rope similar to that used to bind Leinen's ankles was found in a trash can in the garage and behind the washer/dryer. (V10, PP175-77, 178-79, State Exhs. 90-91).

Dr. Marie Hermann, medical examiner, performed the autopsy and photographed injuries. (V10, PP182, 186, 188). Leinen had injuries to the neck, right eye area, right cheek, right side of the mouth, and both sides of the head. (V2, R328-335, V10, PP191-198, State Exhs. 96-110). There were no defensive wounds. (V11, PP232). There were three scalp lacerations on the back of Leinen's head ranging in length from one inch to one-and-one-half inches. (V10, PP194, V11 PP216, 220). The injuries caused the scalp to separate from the skull and caused a significant amount of blood loss. Leinen was alive when the scalp wounds were inflicted. (V11, PP217, 240).

The victim's right eye was bruised, and a laceration above it oozed blood. (V10, PP194,V11, PP217). A significant amount of force caused the eye injury. The victim was alive when this injury was inflicted. (V11, PP218). There were bruises on Leinen's right cheek and lip, and right upper incisor tooth was chipped. (V10, PP194-95, V11, PP218-19). The head injuries were consistent with blunt force trauma. (V11, PP216). Dr. Hermann opined that Leinen may have suffered three separate blows to her face. (V11, PP237). There were fractures of the ribs on

her left side. (V11, PP220). Leinen aspirated blood into her lungs. (V11, PP219, 241).

Leinen had three stab wounds to her back and one stab wound to her head. (V2, R333-35, V10, PP196-97, State Exhs. 107-110, V11, PP220-21, 233). The stab wounds were consistent with knife wounds. (V11, PP223). The first stab wound to her back was three-quarters on an inch in length, and penetrated the body to a depth of five and one half inches. (V11, PP222). The knife penetrated her left upper back, went through the muscle, through the upper portion of her sixth left rib, through the aorta, and entered her heart, penetrating the left atrium. (V11, PP221, 238). The second stab wound to Leinen's back was three-quarters of an inch in length and penetrated her body to a depth of three and three-quarter inches. (V11, PP223). The third stab wound to her back was three-quarters of an inch in length. (V11, PP223). The stab wound to Leinen's head was an inch in length. (V11, PP224). Dr. Hermann concluded that Leinen was alive when all the stab wounds were inflicted. (V11, PP224).

Leinen's hands were "puffy blue and pink" due to the "complex wrapping" of the ligature around her wrists. (V10, PP198, V11, PP226). The rope was tied into "several loops and knots." (V11, PP226). Because Leinen's hands were pulled down behind her back and tied together, she suffered dislocations of her clavicle with the scapula on both sides in the shoulder region. (V11, PP226). She was alive

when the wrist ligature was tied on her. (V11, PP227). This ligature was painful. Leinen's hands would have had tingling painful sensations and there would have been pain with the dislocations in her shoulder joints. (V11, PP227). Since Leinen was a large woman,[9] and placed face down on the floor, she would have had difficulty breathing and had a "suffocation sensation." (V11, PP228).

Dr. Hermann removed the ligatures from Leinen's neck, hands, wrists, and ankles. (V11, PP206). The green nylon rope removed from Leinen's neck had a slip loop type of fastening on the left side. The green nylon rope ligatures removed from Leinen's wrists contained numerous, complex loops and knots. (V11, PP207). The injury to Leinen's neck indicated she was moving from right to left, pulling away from the loop on the left side of her neck. (V11, PP210).There was a "red, raw abrasion furrow coming down from the front of the neck." (V11, PP210). The pressure was applied to the front, right side, and back of Leinen's neck. (V11, PP211). Petechial hemorrhaging in Leinen's eyes indicated that "significant pressure" was applied to her neck, and a "great amount of pressure" caused the injuries. (V11, PP211-213). Leinen was alive when the neck injury occurred. (V11, PP213). She would have been in a "significant amount of discomfort, both physically and psychically, mentally." (V11, PP214).

[9] Leinen was fifty-eight years old, five feet one half inch tall, and weighed two hundred twenty eight pounds. (V11, PP205).

Although Dr. Hermann could not determine the sequence of these "painful" injuries, Leinen "was alive when each of these injuries were inflicted." (V11, PP230, 231). In Dr. Hermann's opinion, cause of death was blunt force trauma, stabbing, and ligature strangulation. (V11, PP228, 229).

Margaret Hughes was familiar with the jewelry Leinen wore. (V10, PP114, 115). She identified photographs of earrings and pendants Leinen "always wore." (State Exhs. 63-84; V2, R305-323; V10, PP160). Russ had pawned the jewelry at a Denton, Texas, pawn shop. (V10, PP115, 160). On May 16, 2007, Investigator Jaynes interviewed the owner of All State Pawn Shop in Denton, Texas. Denton police had previously seized the victim's jewelry that had been pawned at the shop. (V10, PP158). A pawn shop receipt indicated Russ pawned the jewelry on May 11, 2007. (V2, R303-04, V10, PP158-59, State Exh. 62). The victim's car was found on a street in Denton on May 19, 2007. (V10, PP161). Russ's baseball cap was found in the trunk. (V10, PP149, 162).

Irene Anthony, Leinen's sister, read a redacted statement to the court. (V11, PP243, 244-45, 253-54).

Special court counsel presented the testimony of three witnesses: Jack McEligot, Marie Jackson, and James Aaron Russ.

Jack McEligot, private investigator, interviewed potential mitigation witnesses and reviewed records and documents pertaining to Russ. (V11, PP255-56). The following medical records were admitted:

(1) Texas Department of Criminal Justice from 1993-96;

(2) University Medical Center, Lubbock, Texas, from 1996 – 98;

(3) Texas Department of Criminal Justice from 1998 to 2001;

(4) Correctional Managed Health Services, State of Texas, from the years 2001 to 2005;

(5) John E. Polk Correctional Facility from May 2007 to present.

(V11, PP257-259; Defense Exhibits 1-5; V2, R343-399; V3, R400-66; V4, 601-801; V5, R802-1002; V6, R1003-1203; V7, R1204-1404; V8, R1405-1600).

Special court counsel also admitted:

(a) Texas Certificate of High School Equivalency (GED) dated December 6, 1994;

(b) Transcript from Western Texas College in Snyder, Texas showing attendance from 1994 to 1997 and a GPA of 3.67 out of 4.0;

(c) Letter of acceptance to Texas Tech University dated July 17, 1997;

(d) Letter from Texas Tech Director of Center for the Study of Addiction offering Russ a scholarship;

(e) Two scholarship donor forms for Substance Abuse Study Scholarship;

(f) Two thank you letters written by Russ to scholarship donors;

(V11, PP 259-266; Defense Exhibits 6-11; V8, R1601-1604; V9, R1605-1611).

Johnnie Marie Jackson became Russ's stepmother when Russ was twelve years old. (V11, PP267-68). Jackson was married to Russ's father for seven (7) years. (V11, PP268). Russ and his brother, James Aaron, lived with their father and Jackson for three years to four years during that time. (V11, PP269, 272). Their father was physically and verbally abusive to his children. When he got mad, he beat Russ. (V11, PP269, 270, 271). The smallest things would make the father start beating the children. (V11, PP270). This went on the entire time the children lived with them. (V11, PP270). At times Russ was hospitalized or had to receive medical treatment. There were the father would make Russ stay in his room for a few days after a beating and not receive help at all. (V11, PP270-71). The father did not want the hospital to know he was so mean to the children. (V11, PP271). The father was also verbally abusive to the boys, which had as "real bad effect." (V11, PP271). On days school was out, the children had to get up in the morning and work in a bee hive. (V11, PP271). Russ was "scared ... all the time." (V11, PP271).

James Aaron Russ, Appellant's older brother by eighteen (18) months, said he and Russ are very close. (V11, PP272-73, 288). James was aware Appellant had a history of drug use. (V11, PP274, 288). He recalled that Appellant participated in a drug rehabilitation program at Texas Tech University. Appellant was a "success case." (V11, PP275-76, 278). He even received a five-year sobriety

chip. (V11, PP277). Appellant was on TV, interviewed by a city councilman, for a rehabilitation program. (V11, PP277). Prominent people in the Texas community helped Appellant with his addiction. (V11, PP276, 277, 289-90). Appellant had many opportunities to beat his addiction. (V11, PP288). James supported his brother every time the latter abused drugs "as many times as I could throughout the last thirty years." (V11, PP274). Russ' mother did not raise them, but she called Aaron about a year prior to the penalty phase and asked him to forgive her for not being a good mother. (V11, PP274).

After their parents divorced, they were given a choice of who to live with. Their father lived with a really nice lady, "Jill," and their mother was a "slob" who slept all day and stayed out all night. (V11, PP279-80). They chose to live with their father so they would have a safe home, food and clothes. James tried to protect Appellant. (V11, PP280, 287).

James and Appellant were physically and verbally abused by their father, although Appellant took a little bit more verbal abuse than James. (V11, PP278, 287). The first time James remembered the father beating them was over chickens. The father

> [l]aid us over an ottoman . . . he whipped us pretty good. Stood us up against the wall. . . I was about six or seven, he was four or five. We stood against the wall from morning until that night.

(V11, PP279). The father used "whatever he got his hands on" to beat them, including baseball bats, garden hoses, belts, pots and pans. (V11, PP281). He was "crazy as hell" and would "invent ways to whip us." (V11, PP281). He would threaten the boys, saying "I brought you here, I'll take you out." (V11, PP281). When the boys would go to school, they would cover up the bruises. When they were badly bruised, their father kept them home from school. (V11, PP282). When Russ was about thirteen (13) years old, he wasn't holding a rake properly, so the father jumped on top of him with a stick and beat him down in the dirt. (V11, PP282). A neighbor witnessed the beating and called the police. (V11, PP283). James went to a foster home with some friends from high school and lost contact with Russ. James would get reports of Russ being in different homes and misbehaving. (V11, PP283). They did not know where the mother was, so they couldn't live with her. (V11, PP284).

James had lived in Florida, but went to Texas in December, 1989. He owned Aaron Russ Construction and was a contractor. (V11, PP285). He supervised up to thirty (30) employees. He has a "significant other," two sons, and a stepdaughter. (V11, PP286). James had never been in prison. (V11, PP287). James considered Russ more intelligent and articulate than himself. (V11, PP288). Russ was given many opportunities to beat his addiction. (V11, PP288). James

had “my shares of troubles,” but was a successful family and business man (V11, PP289).

TRIAL COURT FINDING OF FACTS

The trial court made the following summary of facts in the sentencing order:

> Shortly before midnight on the evening of May 6, 2007, Longwood Police Officer Brad Tollas noticed a white Jeep Cherokee parked in the parking lot of a business on Bennett Road. He approached the vehicle and observed the Defendant, David Russ, asleep in the driver’s seat. Russ had been on a ten day crack binge, and had cocaine and a crack pipe in the center console of the jeep.
>
> Officer Tollas knocked on the darkly tinted window of the jeep and the Defendant responded saying he was “okay”. When Officer Tollas asked him to roll down the window, the Defendant started the jeep and drove away at a high rate of speed. Officer Tollas pursued the jeep and caught up with it in the Meadows West subdivision. He observed the vehicle, which was traveling at 5 — 10 mph, come to an abrupt stop. No one was found in the vehicle, and the Defendant was not located after a search of the area was conducted. The jeep was abandoned about one block from the victim Madeleine Leinen’s home at 104 Lea Avenue in Longwood.
>
> After fleeing on foot, David Russ spent the night on the rooftop of a house adjacent to the victim’s. Early the next morning, he observed Madeleine Leinen leave for work. It was at that precise moment she was selected as his victim.[2]
>
> [2] As stated by the Defendant in State’s Exhibit #2, his handwritten letter to the Court.
>
> The Defendant entered Leinen’s home where he ate, showered, and laundered his clothes. He went through the house packing jewelry, cash, and a credit card with what he believed to be a valid pin number. He remained at the house awaiting Leinen’s return.[3]
>
> [3] State’s Exhibit #2.

Madeleine Leinen returned to her home shortly after 6:00 p.m. after stopping at Sam's Club in Casselberry. At Sam's Club, the victim purchased both perishable and nonperishable items, A Sam's Club sales receipt detailing the items purchased and noting a checkout time of May 7, 2007, at 5:35 p.m. was on the kitchen counter. Frozen shrimp which were purchased were placed in the freezer and other items purchased were found on a box in the garage and on the kitchen counter.

After killing the victim, the .Defendant took her Toyota Camry and drove straight to the Fairwinds Credit Union in Apopka. There he attempted unsuccessfully to withdraw money from her account at an automatic teller machine. His efforts were captured by a video surveillance camera. The Defendant then left Florida heading towards Texas.

Early on the morning of May 8, 2007, the victim's lifeless body was found face down on the floor of her hail bathroom by a friend. The victim's hands and feet were tightly bound with rope and a rope ligature was around her neck.

The medical examiner observed injuries to the victim consistent with strangulation from the neck ligature. He also noted three lacerations to the victim's scalp which he attributed to blunt force trauma. Four stab wounds, three to the victim's back and one to the head were also found. Additionally, the victim suffered facial bruising, fractured ribs, and a dislocated clavicle in the attack. The cause of death was attributed to multiple injuries resulting from blunt force trauma, stab wounds, and strangulation with a ligature.

Enroute to Texas, the Defendant pawned various items of the victim's jewelry and continued his crack binge by purchasing drugs along the way. The victim's car was recovered in Gainesville, Texas. Items of her jewelry which had been pawned by the Defendant on May 11, 2007, were recovered at a pawn shop in Denton, Texas. The Defendant was arrested by the sheriff's department in Denton, Texas on May 16, 2007.

(V9, R1641-1642).

SUMMARY OF ARGUMENTS

Point 1. When Russ voluntarily waived mitigation, the trial judge followed this Court's procedure in *Muhammad*, ordering a comprehensive pre-sentence investigation and appointing special court counsel. The proffer of possible mitigating evidence by the public defender in order to satisfy the *Koon* requirement that the defendant be apprised of mitigation before he can enter an intelligent waiver, is not "evidence." It is well-established that an attorney proffer is not evidence.

Point 2. The cold, calculated, and premeditated aggravating circumstance was proven beyond a reasonable doubt. Russ lay in wait for the victim, tied her up, forced her to lie on her stomach even though it dislocated her clavicles, beat her in the face and head, strangled her, and stabbed her four times. Russ had been in the house all day collecting valuables. He could have left at any time before the victim arrived or at any point after he had tied her up. The victim did nothing to provoke Russ. Even if this aggravator were stricken, the three remaining aggravators would outweigh the mitigation.

The heinous, atrocious, or cruel aggravating circumstance was proven beyond a reasonable doubt. Russ lay in wait for the victim in her own home. He tied her up, forced her to lie on her stomach even though it dislocated her clavicles, beat her in the face and head, strangled her, and stabbed her four times. The fear,

emotional strain and mental anguish combined with the multiple methods used to eventually murder the victim establishes heinous, atrocious, or cruel aggravating circumstance. Even if this aggravator were stricken, the three remaining aggravators would outweigh the mitigation.

The trial judge did not abuse her discretion in finding and weighing mitigating circumstances. The findings in the sentencing order are supported by substantial competent evidence. This Court will not second-guess or reweigh mitigation on appeal. This case is proportional to other death-sentenced defendants. This case involves a situation in which the defendant lay in wait to attack the victim in her own residence. The victim was tied up with such force that her clavicles dislocated, forced onto the floor of the bathroom face-down with broken ribs, was beat, stabbed and strangled to death. Russ stole the victim's valuables and car. As to the sufficiency of the evidence, Russ's plea was voluntary.

ARGUMENT

POINT 1

THE TRIAL COURT FOLLOWED THIS COURT'S PROCEDURES AND CONSIDERED ALL PROPERLY PRESENTED MITIGATION.

Russ raises several issues in this point:

(1) The trial judge did not consider *all* mitigation because she did not consider the possible mitigation proffered by the public defender at the *Koon*[10] hearing (Initial Brief at 26);

(2) The trial judge did not consider *all* mitigation because she did not consider the possible mitigation contained in the pre-sentence investigation ("PSI") regarding mental illness (Initial Brief at 28, 29);

(3) The trial judge did not consider *all* mitigation because she did not consider the possible mitigation identified in the PSI regarding statements from Beth Webster, Russ's mother, regarding mental health issues, head trauma, and seizures (Initial Brief at 28);

(4) The trial judge failed to require special court counsel to investigate the mitigation proffered by the public defender (Initial Brief at 36).

Russ's argument assumes a proffer is substantive evidence and hearsay is admissible without limitation. The proffer of evidence by the PD was to outline potential mitigating evidence in order to ensure Russ's waiver was voluntary. *See Koon v. Dugger*, 619 So. 2d 246 (Fla.1993). In *Koon*, this Court outlined the procedure that must be followed when a defendant waives the presentation of mitigating evidence:

[10] *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993).

> [C]ounsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Id. at 250; *see also Anderson v. State*, 822 So. 2d 1261, 1268 (Fla. 2002) (quoting *Koon*, 619 So.2d at 250)). "Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision." *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla.2002).

Russ attempts to galvanize the proffer into real evidence. As this Court stated in *Grim v. State*, 841 So. 2d 455, 462 (Fla. 2003):

> Proffered evidence is merely a representation of what evidence the defendant proposes to present and is not actual evidence. *See State v. Warner*, 721 So.2d 767, 769 (Fla. 4th DCA 1998) ("[A] proffer is not evidence ...."), approved on other grounds, 762 So.2d 507 (Fla.2000).

This Court expounded even further on this issue in *LaMarca v. State*, 785 So. 2d 1209, 1216 (Fla. 2001):

> If a defendant elects not to submit proof of mitigating circumstances, the trial court is not required to accept potential mitigating circumstances as proven based on defense counsel's proffer of evidence. *See Chandler v. State*, 702 So. 2d 186, 199-201 (Fla. 1997). Proffered evidence is merely a representation of what evidence the defendant proposes to present and is not actual evidence. *See State v.*

> *Warner*, 721 So. 2d 767, 769 (Fla. 4th DCA 1998) ("[A] proffer is not evidence."), approved on other grounds, 762 So. 2d 507 (Fla.2000). Because appellant waived the presentation of mitigating evidence, he cannot subsequently complain on appeal that the trial court erred in declining to find mitigating circumstances that might otherwise have been found; thus, we affirm the trial court's decision.

See also State v. Gosier, 737 So. 2d 1121, 1122 (Fla. 4th DCA 1999) , *citing* both *Warner* and *Leon Shaffer Golnick Adver., Inc. v. Cedar*, 423 So. 2d 1015, 1016-17 (Fla. 4th DCA 1982) ("[T]he practice we wish to see terminated is that of attorneys making unsworn statements of fact at hearings which trial courts may consider as establishing facts. It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and this court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.").

In *Grim*, this Court also put to rest Russ's argument that the trial judge should "require the presentation of additional mitigation" (Initial Brief at 27):

> Because Grim waived the presentation of mitigation during the penalty phase in the present case, we conclude that he cannot complain on appeal that the trial court abused its discretion by not calling Dr. Larson as its own witness to testify relative to two possible mental statutory mitigators. *See LaMarca v. State*, 785 So. 2d 1209 (Fla.), *cert. denied*, 534 U.S. 925, 122 S.Ct. 281, 151 L.Ed.2d 207 (2001) (holding that the trial court properly declined to evaluate

> proffered mitigation evidence during sentencing because the defendant had waived the presentation of mitigating evidence).

The State also notes that the proffer was nothing more than hearsay upon hearsay and is not admissible evidence. The State, like the defendant, has the right to rebut hearsay in the penalty phase. *See Frances v. State*, 970 So. 2d 806, 814 (Fla. 2007); *Blackwood v. State*, 777 So. 2d 399, 411-412 (Fla. 2000).

The statement at page 28 of the Initial Brief that "the PSI suggests that Russ has been diagnosed with and treated for mental illness" does not accurately reflect the evidence. The only notation in the PSI is that Russ "is or was previously treated" for various illnesses, including "psychiatric Hx." (SRV2, R638). As shown by the records of the John E. Polk Correctional Facility, a psychiatrist noted that in October 2007 Russ had had "major depression" for one month. (V8, R1528). On August 4 and August 17, 2007, Russ had requested that his dosage of Sinequan be increased "if I was still struggling with depression and lack of sleep." (V12, R1544). The psychiatrist, Dr. Westhead, met with Russ on August 21, 2007, and noted "major depression" as her impression. (V12, R1561). The only mention of "psychiatric Hx" is from the questionnaire filled out in June 2007, which asked "do you now have or have you ever had" "psychiatric Hx." The box for "psychiatric Hx" was checked. (V12, R1530). This apparently indicated current problems, because the records show that Russ had never been diagnosed with a

mental illness. (V12, R1535). The lack of any mental illness is substantiated by the PSI which states that:

> The mother stated he has no mental health illnesses diagnosed. She thinks he does, though. She stated that his father beat him half his life. The subject's mother stated that the father was a mean man. The Texas Department of Criminal Justice Health Summary dated 10/1/93 lists the subject was never treated for mental illness. The Denton County Medical Intake Information form of 5/16/07 lists chest congestion as being the only illness he was suffering from at that time.
>
> The form also states medical was notified of the condition. There is no listing of any mental health problem and no medical attention was required on 5/16/07.

(SRV2, R638). Thus, the intake forms for Texas Department of Criminal Justice, Denton County, and John E. Polk Correctional show there was no history of mental illness. The only indication of mental health problems was after he was incarcerated at John. E. Polk Correctional and complained of depression. Russ was first prescribed the Sinequan anti-depressant on June 17, 2007, after he met with the psychiatrist. (V12, R1555, 1562). The mental health intake form noted Russ was oriented, had normal mood, relevant speech, no abnormalities in thought pattern. Russ was having problems sleeping. Russ denied any psychiatric history or treatment. (V12, R1564). Russ said he was "extremely depressed" because he "had a good life and now it's gone due to the drugs." Russ was facing the death penalty or life in prison and could not sleep well. (V12, R1565).

The other "evidence" cited by Russ on page 28 of his Initial Brief is equally unimpressive. The evaluation in "1978 (when the defendant was sixteen)" was part of the public defender proffer. Russ was 43 years old when he was arrested. The statements from the mother that Russ has had "no mental health illnesses diagnosed" but she "thinks he does" are speculative statements from an unqualified witness who was absent from Russ's life as we know from the sworn testimony of Russ's brother, James. The PSI statement that Russ was "treated for head trauma" (Supp. R 638) ignores the fact that special court counsel requested a mental health evaluation by Dr. Golden and PET scan, but Russ refused. (V13, R563-64, 567-68). The State also notes that, although Russ faults counsel for failing to present the testimony of his sisters, the PSI reflects that two of the three sisters are deceased. (Supp. R637).

Russ cites to *Barnes v. State*, 29 So. 3d 1010 (Fla. 2010), as if that were persuasive authority. (Initial Brief at 34). It is not. In *Barnes*, as in the present case, the defendant claimed the trial judge did not follow the procedures this Court set forth in *Muhammad v. State*, 782 So.2d 343 (Fla. 2001). In *Muhammad,* 782 So. 2d at 363-365, this Court established the procedure to be followed by trial judges when a defendant waives mitigation:

> It is clear from our previous cases that we expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses to present mitigating evidence. We have repeatedly emphasized the duty of the trial court to consider all mitigating

evidence "contained anywhere in the record, to the extent it is believable and uncontroverted." *Farr v. State*, 621 So. 2d 1368, 1369 (Fla. 1993) (" Farr I "); see, e.g., *Hauser v. State*, 701 So. 2d 329, 330-31 (Fla.1997); *Robinson v. State*, 684 So. 2d 175, 176, 179 (Fla. 1996). This requirement "applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence." *Farr I* 621 So. 2d at 1369.

In the past, we have encouraged trial courts to order the preparation of a PSI to determine the existence of mitigating circumstances "in at least those cases in which the defendant essentially is not challenging the imposition of the death penalty." *Farr v. State*, 656 So. 2d 448, 450 (Fla.1995) ("*Farr II*"); *see Allen v. State*, 662 So. 2d 323, 330 (Fla.1995). Having continued to struggle with how to ensure reliability, fairness, and uniformity in the imposition of the death penalty in these rare cases where the defendant waives mitigation**, we have now concluded that the better policy will be to require the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigation evidence**.FN10 To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. **In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records.**FN11 Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses. This precise procedure has been suggested by the New Jersey Supreme Court in *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939, 992 (1988), FN12 and recognized as appropriate by the Georgia Supreme Court in *Morrison v. State*, 258 Ga. 683, 373 S.E. 2d 506, 509 (1988). FN13 **If the trial court prefers that counsel present mitigation rather than calling its own witnesses, the trial court possesses the discretion to appoint counsel to present the mitigation as was done in *Klokoc v. State*, 589 So. 2d 219 (Fla. 1991) FN14 or to utilize standby counsel for this limited purpose.FN15 (Emphasis supplied, footnotes omitted).**

In *Barnes*, this Court held that the trial judge followed this Court's instructions in *Muhammad.* The trial judge in the present case likewise followed the letter of the law. She requested a comprehensive PSI and appointed special court counsel to develop mitigation. Whether Russ believes court counsel failed to develop adequate mitigation is not an issue for direct appeal and calls for facts outside the record which could only be developed in post-conviction proceedings.

POINT 2

THE TRIAL COURT DID NOT ERR IN FINDING AGGRAVATING CIRCUMSTANCES AND WEIGHING MITIGATING CIRCUMSTANCES; THE DEATH SENTENCE IS PROPORTIONAL; THE EVIDENCE IS SUFFICIENT.

Russ raises several issues in this point:

(1) The trial judge erred in finding the aggravating circumstance of cold, calculated and premeditated ("CCP") (Initial Brief at 39);

(2) The trial judge erred in finding the aggravating circumstance of heinous, atrocious, and cruel (Initial Brief at 46);

(3) The trial judge "glossed over" the mitigating factors and did not afford the appropriate weight (Initial Brief at 53);

(4) The death sentence is disproportionate (Initial Brief at 55).

Cold, calculated and premeditated. Russ argues that the murder was not cold, calculated, and premeditated. He claims he did not have a plan to murder Ms. Leinen, and the murder was "prompted by panic or rage." (Initial Brief at 41). Russ waited in Ms. Leinen's home all day for her to return. He immobilized her

by tying her hands and feet. He then set about murdering her using various weapons until he succeeded. There is no indication, either in his letter to the judge or the evidence that indicated panic or rage. In fact Russ stated in his letter that the murder was premeditated, and he pled to premeditated murder. Russ further argues that the trial judge erred in stating that no-sign-of-struggle can indicate CCP (Initial Brief at 42).

CCP can be indicated by the circumstances if they point to such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. *Farina v. State*, 801 So. 2d 44, 53-54 (Fla. 2001); *Bell v. State*, 699 So. 2d 674, 677 (Fla. 1997). When a defendant has opportunities to abandon his crime but continues on to kill unresisting victim(s), the CCP aggravating circumstance is proper. *See McCoy v. State*, 853 So. 2d 396, 407-408 (Fla. 2003); *Looney v. State*, 803 So. 2d 656, 678 (Fla. 2001) (applying CCP where "the defendants had ample opportunity to reflect upon their actions, following which they mutually decided to shoot the victims execution-style"), *cert. denied*, 536 U.S. 966, 122 S.Ct. 2678, 153 L.Ed.2d 850 (2002); *Alston v. State*, 723 So. 2d 148, 162 (Fla. 1998) (sustaining the CCP aggravator where the defendant had ample opportunity to release the victim but chose to kill him); *Eutzy v. State*, 458 So. 2d 755, 757 (Fla. 1984) (sustaining CCP where there was no sign of struggle, yet the victim was shot execution-style). Lack

of resistance or provocation by the victim can indicate both a cold plan to kill as well as negate any pretense of justification. *Franklin v. State*, 965 So. 2d 79, 99 (Fla. 2007). *See also Thompson v. State*, 648 So. 2d 692, 696 (Fla. 1994) (noting that there was no indication that one of the victims resisted the defendant); *Eutzy v. State*, 458 So. 2d 755, 757 -758 (Fla. 1984) (noting no evidence of a struggle); *Williamson v. State,* 511 So. 2d 289 (Fla.1987) (finding no pretense of justification for stabbing fellow inmate where victim had made no threatening acts toward defendant).

Russ next argues that because he only had 25-30 minutes to murder the victim, there was "a much lesser time for any reflection about the killing." (Initial Brief at 43). This argument ignores the fact that Russ, by his own admission, was in the home all day eating, showering, and collecting valuables. He had at least eight to nine hours of planning before the victim returned.

Russ claims that even though he admitted that he lay in wait for the victim and premeditated the murder, the murder was not CCP. (Initial Brief at 43). Russ claims his statements could mean he only intended to rob the victim. (Initial Brief at 44). If that were true, he could have left before Ms. Leinen came home. If Russ wanted to wait to take her car, he could have easily done that one he tied up the victim and had her disabled on the bathroom floor. Ms. Leinen was five (5) feet tall and weighed 228 pounds. She was 58 years old. (V11, PP205). Russ is six (6)

feet one inch tall and weighs approximately260 pounds according to his girlfriend; 230 pounds according to the arrest warrant; 250 pounds according to the intake sheet. (V1, R16-17, V10, PP91). Ms. Leinen was obviously no threat to Russ, and he could have simply left her tied up while he stole the car and valuables. However, Russ proceeded to systematically beat, strangle, and stab the victim until he was sure she was dead.

Russ points to the fact the victim was still wearing jewelry as evidence the murder was done in haste. (Initial Brief at 44). He fails to explain how Russ was supposed to extract that jewelry when he had a ligature around Ms. Leinen's neck, and her hands were tied up and swollen.

Finally, Russ argues the murder was the product of being high on crack cocaine. (Initial Brief at 45). There was no evidence Russ used drugs between the time he ran from his Jeep at approximately 10:30 p.m. the prior day until Ms. Leinen arrived home at 6:00 p.m. During the time the victim left in the morning until she arrived home, Russ showered, ate, and lounged around the victim's house. There was no evidence whatsoever that Russ was anything less than calm and cool. He immobilized the victim, murdered her, and took the car - - just like he had been planning all day.

The trial judge found:

> To establish this aggravating circumstance, the State must prove beyond a reasonable doubt that: (1) the murder was the product of

cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage, (2) the Defendant had a careful plan or prearranged design to commit murder before the killing, (3) the Defendant exhibited heightened premeditation, and (4) the Defendant had no pretense of moral or legal justification.

In his letter to the Court[7], the Defendant stated that after eluding pursuit by Officer Tollas he spent the night on the rooftop of a house adjacent to Leinen's home. He wrote, "At dawn I awakened. I saw the victim leaving for work. I chose my victim at that exact moment." Further in the letter he states, "Was the murder premeditated? Yes your Honor it was. Did 1 believe I was capable of such a crime while on a drug crime spree? No, I did not. I was no doubt a cold blooded killer on that day."

[7]State's Exhibit #2.

The Defendant remained in the victim's home the entire day, waiting for her to return. Crime scene Investigator Ohlson found rope similar to the rope used to bind the victim's feet in the trash can and behind the washer and dryer in the garage. A different type of rope was used for the neck ligature and to bind the victim's hands using a complex series of knots.

The victim's home was neat and tidy and without any signs of a struggle. Blood droplets were found in the garage, but the actual killing appeared to take place in the hail bathroom. Common sense and the evidence at the scene indicate the Defendant likely first encountered the victim in the garage, subdued her with an initial blow, and walked her through the house to the hail bathroom.

The evidence indicates the victim's murder was not a spontaneous or impulsive act. Nor was it done in a frenzy or rage. While the evidence establishes the Defendant had been using crack cocaine heavily in the days preceding May 7, 2007, there was no evidence that the Defendant was under the influence of drugs at the time of the murder. Rather, Madeleine Leinen's murder was the product of the Defendant's prearranged design. He had selected her as his victim early that morning. He waited hours for her to return home. Prior to

> her murder he procured two types of rope and a knife to execute his plan. The absence of any signs of a struggle and the lack of defensive wounds on the victim indicate she offered no resistance. Once in the bathroom, the Defendant meticulously tied Leinen's hands and feet and used three different means to ensure her death. Undoubtedly, many of the victim's wounds occurred as she lay bound and helpless on the floor. No evidence of moral or legal justification was presented or argued.
>
> The Court finds the above stated evidence[8] establishes this aggravating circumstance beyond a reasonable doubt, and it is given great weight.
>
> [8] During the penalty phase, in support of this aggravator, the State introduced evidence of a residential burglary in Texas which occurred May 14, 2007, days after the Leinen murder. The Court has not considered that evidence in determining proof of the existence of this factor. Given the date of that offense, it is not relevant to prove heightened premeditation or prearranged design or plan to commit the murder in this case.

(V9, R1646-1648).

This Court's review of a trial court's finding regarding an aggravator is limited to whether the trial court applies the correct law and whether its finding is supported by competent, substantial evidence. *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997); *see also Cave v. State*, 727 So. 2d 227, 230 (Fla. 1998). The trial court's findings are supported by the evidence and should be affirmed.

Heinous, atrocious and cruel. Russ challenges the heinous, atrocious and cruel aggravating circumstance because Russ did not *intend* to inflict a high degree of pain. (Initial Brief at 47). This argument has been rejected repeatedly by this Court. In *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003), this Court held that

when the heinous, atrocious, or cruel aggravator is analyzed, the focus is not on the intent of the assailant, but on the actual suffering caused to the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. See *Schoenwetter v. State*, 931 So. 2d 857, 874 (Fla. 2006); *Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001). The victim's mental state may be evaluated in accordance with common-sense inferences from the circumstances. *Swafford*, 533 So. 2d 270, 277 (Fla. 1988) (citing *Preston v. State*, 444 So. 2d 939, 946 (Fla. 1984)). This Court has also held that to support this aggravator, the evidence must demonstrate that the victim was conscious and aware of impending death. *Douglas v. State*, 878 So. 2d 1246, 1261 (Fla. 2004). However, the actual length of the victim's consciousness is not the only factor relevant to this aggravating circumstance. *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000). "[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997). This Court has further held that the actions of the defendant preceding the actual killing are also relevant. *Gore v. State*, 706 So. 2d 1328, 1335 (Fla.1997) (citing *Swafford*, 533 So. 2d at 277, and *Smith v. State*, 424 So. 2d 726, 733 (Fla.1982)).

In *Hernandez v. State*, 4 So. 3d 642, 669-671 (Fla. 2009), the defendant argued that because the evidence was inconclusive regarding whether the victim was conscious when he cut her neck, the finding of the HAC aggravator was improper. This court held that the argument "ignores the entire context within which the murder occurred." Similar to the present case, the victim in *Hernandez* was grabbed by the head and forced into her home. Her face was covered with a pillow in an attempt to suffocate her while her arms and hands were held to immobilize her. The victim's her nose, lips, and eyes contained large dark bruises which indicated that extreme force was used against her when she was grabbed by the face, or during the attempted suffocation, or both. Hernandez was unable to suffocate the victim, so he twisted her neck, then cut her throat. The medical examiner could neither rule out nor confirm whether the victim could feel pain associated with the neck wound. The victim bled profusely, which indicated that her heart was beating when she was stabbed. This Court found HAC appropriate, *citing Lott v. State*, 695 So. 2d 1239 (Fla.1997).

In *Lott*, the defendant argued that because the victim may have been unconscious at the time of the fatal attack, the HAC aggravator was not proven beyond a reasonable doubt. However, the facts showed that from the minute Defendant entered the home until the victim was choked into unconsciousness, she suffered unspeakable humiliation, terror, and pain. Her mouth, wrist, and ankles

were taped making her totally defenseless. Ultimately, the defendant slashed her throat. This Court rejected the defendant's argument on appeal, explaining that "[a]lthough [the victim] may not have been conscious at the time that Lott made the fatal slash which caused her death, the physical torture and emotional trauma she suffered during the time leading up to her death justify application of the HAC aggravator." *Id.*

Russ also argues that there are no signs of defensive wounds or a struggle, thus Ms. Leinen could not have felt mental anguish. (Initial Brief at 48). Ms. Leinen was tied up so forcefully it dislocated both clavicles. She was beaten about the fact and two ribs broken. She was laid on her face, which the medical examiner said would be extremely uncomfortable given the victim's weight and height. Thus, the victim was completely helpless and in pain as Russ implemented various forms of torture on her until he managed to kill her. Ms. Leinen was subjected to the terror of a stranger in her home accosting her and tying her up. The bindings were so tight, the victim's hands were swelling and bruised. She was forced to lay on her stomach while Russ attacked from behind. Although Russ argues that the victim could have been rendered unconscious at any point, it defies logic that Russ would continue seeking out various methods of killing if the victim were incapacitated. The fear and emotional strain Ms. Leinen felt was abhorrent and prolonged. This Court has held that even 30 to 60 seconds of terror supports the

HAC aggravating circumstance. *See Rolling v. State*, 695 So. 2d 278, 296 (Fla. 1997). This Court recently explained:

> With respect to the HAC aggravator, this Court has held that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997). This Court has also held that "the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So. 2d 274, 277 (Fla.1998). Furthermore, "the victim's mental state may be evaluated for purposes of such determination in accordance with a common-sense inference from the circumstances." *Swafford v. State*, 533 So. 2d 270, 277 (Fla.1988); see also *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003) ("[T]he focus should be upon the victim's perception of the circumstances...."). And, in *Buzia v. State*, 926 So. 2d 1203, 1214 (Fla. 2006), this Court upheld the finding of the HAC aggravator and stated: "Whether this state of consciousness lasted minutes or seconds, he was 'acutely aware' of his 'impending death.'" We have upheld the HAC aggravator where the victim was conscious for merely seconds."

Aguirre-Jarquin v. State, 9 So. 3d 593, 608-609 (Fla. 2009). *See also Francis v. State*, 808 So. 2d 110, 135 (Fla. 2001) (sisters killed in presence of each other could have remained conscious for as little as a few seconds and for as long as a few minutes); *Peavy v. State*, 442 So. 2d 200, 202-03 (Fla.1983) (upholding finding of HAC where medical examiner testified that victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds).

The fact that Russ used multiple weapons leads to the reasonable conclusion that no one weapon was successful in satisfactorily subduing the victim. If the victim were unconscious, there would be no further need to stab, strangle, and beat her. This case is textbook HAC. *See Geralds v. State*, 674 So. 2d 96, 103 (Fla. 1996) (swollen condition hands established victim bound with plastic ties around her wrists for at least twenty minutes prior to her death; victim severely beaten prior to death as evidenced by the bruises and cuts on various parts of her face and chest area; evidence of 10 to 15 blunt force injuries; bruises indicated the blows were sufficient to knock her down and/or render her unconscious; victim stabbed three times in the neck); *Perry v. State*, 522 So. 2d 817 (Fla.1988) (victim "brutally beaten in the head and face" and "choked and repeatedly stabbed in the chest and breasts; victim "died of strangulation associated with stab wounds); *Hardwick v. State*, 521 So. 2d 1071 (Fla.) (finding evidence supported heinous, atrocious, or cruel aggravator when victim became unconscious within five to six minutes of being stabbed three times in chest and back, then shot in back and then struck about head); *Preston v. State*, 444 So. 2d 939, 945-46 (Fla.1984) (holding murder was especially heinous, atrocious, or cruel where, after robbing store, defendant forced victim to accompany him on mile and a half journey, then forced her to walk at knifepoint for 500 feet, though victim may not have been aware of wounds inflicted after defendant's initial slashing of her throat which severed jugular vein,

trachea, and other main arteries of neck); *Geralds v. State*, 674 So. 2d 96, 102 -103 (Fla. 1996); *Taylor v. State*, 630 So. 2d 1038, 1042-43 (Fla.1993) (heinous, atrocious, aggravator supported by the evidence despite fact appellant contended there was no evidence victim was conscious or endured great pain or mental anguish during the murder; victim stabbed at least twenty times with two different weapons and suffered twenty-one other lacerations, bruises, and wounds, and received several blows to her head and face from blunt objects); *Allen v. State*, 662 So. 2d 323, 331 (Fla.1995) (as in *Taylor*, the medical examiner in Allen testified that the victim was "alive" when she was beaten repeatedly).

The trial judge held:

> In determining whether this aggravating circumstance has been proved the Court considered the means and manner by which the Defendant caused Madeleine Leinen's death and the immediate circumstances surrounding it.
>
> Dr. Marie Hermann, the medical examiner, testified the victim suffered three lacerations to the head as a result of blunt force trauma. The lacerations caused the scalp to separate from the skull. The bleeding under the scalp indicated the victim was alive when these blows were inflicted, although any one of the blows could have rendered her unconscious.
>
> Four stab wounds were also indentified, three to the victim's back and one to her head. A weapon with two sharp edges, most likely a knife, was used to inflict all four wounds. Bleeding into tissue surrounding these wounds indicates the victim was alive when she was stabbed. The stab wounds could have caused a loss of consciousness, but Dr. Hermann was unable to establish a time parameter as to when such loss might have occurred.

The front, sides, and back of the victim's neck had abrasion furrows and scraped skin.[5] Petechial hemorrhaging in her eyes was also observed. These injuries resulted from the great pressure applied to the victim's neck with the ligature. The appearance of the abrasions indicated that these injuries were sustained while Leinen was alive. Dr. Hermann opined the victim was conscious for at least 10 — 13 seconds after the complete compression of her blood vessels, and would have suffered a significant amount of discomfort during the strangulation.

[5]State's Exhibits #96, #97, #98, and #99.

In addition to the injuries which contributed to Leinen's death, numerous less serious injuries were observed. Bruising, and a laceration to the brow ridge of the victim's right eye, were the result of a significant blow to the eye while she was still alive. Fractured ribs, contusions to both lips and the right cheek, as well as a chipped tooth were also noted.

Due to the victim's size, her clavicle was dislocated on both sides when her hands were pulled down and bound behind her back. While alive, her hands were so tightly bound that the lack of blood circulation caused them to become puffy and extremely discolored.[6] Dr. Hermann testified that these conditions would have been painful to the victim. In addition, being positioned on her stomach would have caused the victim to experience a suffocating sensation because her large abdomen and chest would have limited the ability of her diaphragm to move.

[6]State's Exhibit #111.

A finding that the murder of Madeleine Leinen was especially heinous, atrocious, or cruel is supported by the following evidence:

> 1. The evidence proves the victim was beaten, strangled, and stabbed four times. The medical examiner, while unable to affix unconsciousness at any particular point, testified the victim was alive when the stab wounds, blows to the head, and strangulation occurred. *Willacy v. State*, 696 So. 2d 693 (Fla. 1997). *Taylor v. State*, 630 So. 2d 1038 (Fla. 1994). Indeed, it has been previously held that strangulation alone creates a

> prima facie case for this aggravating factor. *Orme v. State*, 677 So. 2d 258 (Fla. 1996).
>
> 2. The evidence supports a finding that her hands and feet were bound while most of these painful injuries were inflicted.
>
> 3. Even if she was conscious only briefly, the terror the victim must have felt while tied up and powerless to stop her own murder, is almost unimaginable. *Beasley v. State*, 774 So. 2d 649 (Fla. 2000).
>
> For the above reasons, Leinen's murder falls well within the definition of the terms heinous, atrocious, or cruel, and the Court finds this aggravating circumstance has been established beyond a reasonable doubt and gives it great weight.

(V9, R1644-46). These findings are supported by competent substantial evidence, and the HAC aggravating circumstance should be affirmed.

Harmless error. Even if this Court struck CCP or HAC, the death sentence would stand. When this Court strikes an aggravating factor on appeal, the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence. *Williams v. State*, 967 So. 2d 735, 765 (Fla. 2007) (quoting *Jennings v. State*, 782 So.2d 853, 863 n. 9 (Fla. 2001)).

In *McWatters v. State*, 35 Fla. L. Weekly S169 (Fla. Mar. 18, 2010), this Court struck CCP for one of the three murders, but noted that three strong aggravating factors remained: (1) McWatters was convicted of prior violent and capital felonies (contemporaneous murders and sexual batteries); (2) the capital felony was committed while in the attempt, commission, or flight from a sexual battery; and (3) HAC. In the present case, there is no reasonable possibility that

the trial court would have imposed a different sentence had it not considered CCP. Thus, any error in finding CCP was harmless beyond a reasonable doubt. *See also Geralds v. State*, 674 So. 2d 96, 104 (Fla. 1996) (erroneous finding of CCP harmless based on two valid aggravators-that the murder was heinous, atrocious, or cruel, and that the murder was committed during a robbery/burglary); *Chamberlain v. State*, 881 So. 2d 1087, 1107 (Fla. 2004) (holding trial court's erroneous finding of CCP harmless because four aggravating factors remained); *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla.2002) (holding that even if the evidence was insufficient to support CCP, such error would be harmless because four aggravating factors remained).

Likewise, if this Court struck HAC, any error would be harmless. *See Diaz v. State*, 860 So. 2d 960 (Fla. 2003) (death sentence still appropriate after consideration of two remaining aggravating factors and five mitigating circumstances); *Knight v. State*, 746 So. 2d 423, 435-36 (Fla. 1998) (death sentence still appropriate after consideration of five remaining aggravating factors and three nonstatutory mitigating circumstances); *Hartley v. State*, 686 So. 2d 1316, 1323-24 (Fla. 1996) (five remaining valid aggravating factors); *Green v. State*, 641 So. 2d 391, 396 (Fla. 1994) (three other aggravating factors support the death penalty).

Finding and weighing mitigating circumstances. Russ claims the trial court's order does not meet the standards necessitated by the capital sentencing scheme. (Initial Brief at 53). He claims the trial judge "glossed over the mitigating factors and improperly abused its discretion in giving them little weight." *Id*. Russ does not claim that the trial judge failed to consider any specific mitigation, only that he disagrees with the weight afforded that mitigation.

The trial court found:

> **MITIGATING CIRCUMSTANCES**
> **STATUTORY MITIGATING CIRCUMSTANCES**
>
> No evidence of any statutory mitigating circumstances as set forth in Florida Statute 921.141(6)(a)(b)(c)(d)(e)(f) or (g) was presented or argued.
>
> The existence of any other factors in the Defendant's background that would mitigate against imposition of the death penalty. Florida Statutes 921.141 (6)(h).
>
> **The Defendant had an abusive childhood.**
>
> After their parents divorced, the Defendant and his brother lived for a time with their mother, who was very neglectful. For the most part, she went out all night and slept all day, leaving the children to fend for themselves. In an effort to avoid further neglect, the boys elected to live with their father when he remarried.
>
> The Defendant's older brother James Aaron Russ, and stepmother Marie Jackson, testified as to the verbal and physical abuse the Defendant suffered at the hands of his father. Physical beatings, at times using pots, pans, a baseball bat, a garden stake, and a garden hose, were routine for both boys, but worse for the Defendant.
>
> When the Defendant was around thirteen, a neighbor called police after witnessing him receive a particularly severe beating. Both boys

were removed from the home and placed in foster care. They remained in foster care because their mother could not be located. The boys were separated in foster care and had only limited contact with each other.

This abusive and neglectful treatment, and the resulting placement in foster care, negatively impacted the Defendant. He was very frightened of his father as a child and increasingly angry and rebellious as he got older. He remained estranged from both his father and his mother even after reaching adulthood.

The Court is reasonably convinced of this mitigating circumstance and gives it moderate weight.

The Defendant suffers from a severe, long term addiction to drugs which he has been unable to conquer despite numerous attempts at rehabilitation.

The Defendant states in his letter to the Court that he began his cocaine use at age twenty.[9] His drug use began "a progressive pattern of lying, cheating, and stealing, just to get more cocaine." The Defendant acknowledges committing over one hundred burglaries as an adult to finance his addiction. Some of these crimes resulted in jail or imprisonment.

[9]See State's Exhibit #2, which is the source of much of the content in this section.

In an effort to address his addiction, the Defendant has been in various treatment programs while both in and out of custody. He has been in inpatient and outpatient treatment, and both individual and group counseling. He even attended Texas Tech University's substance abuse counseling program to become a counselor, and was a member of the school's "Center for the Study of Addiction".

In early 2007, the Defendant had been living with Kimberly Williams and working as a roofer. He was earning a good income, and was a fully contributing member of the household. A few months before May 7, 2007, the Defendant relapsed and again began using cocaine.

Once reignited, his addiction escalated to the point where he exhausted his funds and again resorted to burglaries to support his $500.00 to $600.00 a week habit. For the ten days prior to the murder, he had been smoking crack cocaine nonstop. Late on the evening of May 6, 2007, he had finally pulled over in his jeep to sleep, when he was approached by Officer Tollas.

No evidence was presented as to what effect, if any, the Defendant's prior cocaine use had on the Defendant's behavior on May 7, 2007. Nor was any evidence presented that the Defendant was using cocaine on the day of the murder.[10] However, the Defendant's long term addiction and bingeing in the days immediately prior to the murder no doubt motivated the Defendant's actions and behavior on May 7, 2007.

> [10]This fact, however, is not determinative of whether long time substance abuse is mitigating. *Mahn v. State*, 714 So. 2d 391 (Fla. 1998).

The Court is reasonably convinced of this single mitigator and gives it some weight.

NONSTATUTORY MITIGATING CIRCUMSTANCES

In the sentencing memoranda submitted by defense counsel and special counsel for the Defendant, overlapping mitigation which falls into various categories was argued. The Court will now address the evidence presented in mitigation.

The Defendant is remorseful for the homicide.

The Court recognizes that remorse, when genuine, should be considered as a mitigating factor. *Beasley v. State*, 774 So. 2d 649 (Fla. 2000). The Defendant in this case has fully accepted responsibility for his actions. He elected to waive his right to a jury trial and enter a plea of guilty to the charges without receiving any sentencing benefit in exchange for his plea. He waived a penalty phase jury and requested no mitigation be presented on his behalf. He

has repeatedly voiced his remorse and his desire to minimize any further suffering by the victim's family and friends.

The Court finds the Defendant's expressions of remorse through his words, actions, and demeanor are genuine. The Court is reasonably convinced of this mitigating circumstance and gives it moderate weight.

The Defendant suffers from multiple medical problems.

Medical records from the John E. Polk Correctional Facility, Texas Department of Criminal Justice, and University Medical Center, in Lubbock, Texas, indicate the Defendant has in the past or currently suffers from various health conditions including: a thyroid imbalance, Hepatitis C, severe headaches, knee problems, vertigo, allergies, kidney stones, degenerative disc disease, head trauma, heart attack, dental problems, vision problems, asthma, chronic acid reflux, exposure to tuberculosis, and MRSA infection.

Upon being booked into the John E. Polk Correctional Facility in June of 2007, the Defendant was diagnosed with major depression and treated by the jail psychiatrist. There is no evidence any of these medical conditions affected the Defendant's actions on May 7, 2007, or played any role in the murder of Madeleine Leinen.

The Court, while reasonably convinced of this circumstance, gives it very little weight.

The Defendant has the capacity to form and maintain loving and caring relationships with both family and non-family members.

The Defendant's older brother, James Aaron Russ, testified he tried to act as the Defendant's protector during their abusive childhood. He stated he supported the Defendant as much as possible and the Defendant was "there for him too."

Kimberly Williams was the Defendant's girlfriend from November of 2006 through the time of his arrest. The two lived together along with her young son and her eighty year old aunt. He enjoyed a loving relationship with all the members of the household. During that time, the Defendant became a father figure to her son, whom he would

often help with his homework. The Defendant also had a caring relationship with Williams' elderly aunt who had limited physical mobility. He would stay with her and lift her so she could fish and do other activities outside the home. Prior to the Defendant's relapse in early April of 2007, he fully contributed to the household financially, and by cooking, cleaning, and doing laundry.

The Court is reasonably convinced of this mitigating circumstance and gives it little weight.

The Defendant has pursued higher education and is skilled in the roofing trade.

The Defendant dropped out of high school, but subsequently obtained his G.E.D. in 1994. Between 1994 and 1997, he attended Western Texas College where he earned a GPA of 3.67. He was approved for admission to Texas Tech University in 1997, and received scholarship awards to pursue substance abuse studies there.

The Defendant also possessed roofing skills, and worked as a roofer in both Florida and Texas.

The Court is reasonably convinced of this single mitigating circumstance and gives it little weight.

The Defendant has no violent criminal history.

The Defendant's extensive criminal history spans over twenty years and contains numerous felony convictions for both property or theft related crimes and drug offenses. There is no evidence that the Defendant had previously been convicted of a violent crime.

However, while having a conviction for a felony involving the use or threat of violence to a person is an aggravating circumstance under Florida Statute 921.141 (5)(b), the absence of such convictions when viewed in the context of the facts in this case and the Defendant's lengthy criminal history is not strongly mitigating. The Defendant's life shows only relatively brief interludes between convictions and periods of incarceration.

> The Court, while reasonably convinced of this circumstance, finds it to be of minimal mitigating value, and gives it little weight.
>
> **The Defendant behaved appropriately in the courtroom.**
>
> The Defendant, at all court proceedings in this case, behaved appropriately. The Court is reasonably convinced of this mitigator and gives it little weight.
>
> The Defendant wrote thank you notes to his scholarship donors at Texas Tech University in 1997.
>
> The Defendant wrote letters expressing his gratitude and appreciation to the two donors who funded his substance abuse scholarship at Texas Tech University in 1997. While both letters were well written, it appears they were academically mandatory, not spontaneously generated, and were required to follow a prescribed format.[11]
>
> [11] See Defendant's Exhibits #10 and #11.
>
> The Court, while finding this circumstance has been reasonably established, gives it very little weight.

(V9, R1650-54).

This Court reviews the weight the trial court ascribes to mitigating factors under the abuse of discretion standard and will not reweigh these mitigators. *See Smith v. State,* 998 So. 2d 516, 527 (Fla. 2008). This Court defers to the trial court's determination "unless no reasonable person would have assigned the weight the trial court did." *Rodgers v. State*, 948 So. 2d 655, 669 (Fla. 2006). The trial court's order is supported by competent substantial evidence, and she did not abuse her discretion in weighing mitigation.

Proportionality. This Court is obligated to review each death sentence to determine whether it is proportional to other cases. *See Floyd v. State*, 913 So. 2d 564, 578 (Fla. 2005); *Porter v. State*, 564 So. 2d 1060, 1064 (Fla.1990). This Court makes "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State*, 841 So. 2d 390, 407-08 (Fla. 2003).

In the present case, there are four strong aggravators: HAC, CCP, committed during a kidnapping, and pecuniary gain. The HAC and CCP aggravators are "two of the most serious aggravators set out in the statutory sentencing scheme." *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). There is some non-statutory mitigation, none of which was given, nor is it entitled to, much weight.

This case is proportionate to other death-sentenced defendant. *See Banks v. State*, 36 Fla. L. Weekly S313 (Fla. June 3, 2010)(victim stabbed to death; aggravators of HAC, CCP and prior violent felony; mitigation of low IQ, brain deficit, antisocial personality, not the only participant, difficult youth); *Merck v. State*, 975 So.2d 1054 (Fla. 2007)(stabbing murder aggravators of HAC and prior violent felony; mitigation of age, difficult family background, alcohol use the night of murder and capacity to form positive relationships); *Singleton v. State*, 783

So.2d 970 (Fla. 2001)(stabbing murder; aggravators of HAC and prior violent felony; mitigation of extreme emotional disturbance; substantially impaired capacity, under influence of alcohol and medication); *Smithers v. State*, 826 So. 2d 916, 931 (Fla. 2002) (victim was strangled, stabbed, and beaten, and trial court weighed prior violent felony, HAC, and CCP against two statutory mental health mitigating factors and seven nonstatutory mitigating factors); *Blackwood v.* State, 777 So.2d 399 (Fla. 2000)(strangulation murder; HAC aggravator; one statutory mitigator and eight nonstatutory mitigators); *Orme v. State*, 677 So. 2d 258, 263 (Fla.1996) (sexual battery, beating, and strangulation of victim where aggravators included HAC, pecuniary gain, and commission during sexual battery and mitigating factors included substantially impaired capacity and extreme emotional disturbance); *Willacy v. State* 696 So. 2d 693, 695 (Fla. 1997) (defendant lay in wait for victim, beat and strangled her; aggravating circumstances of committed in the course of a robbery, arson, and burglary; committed to avoid lawful arrest, committed for pecuniary gain, HAC, and CCP; no statutory mitigating factors and thirty-one nonstatutory mitigating factors); *Hauser v. State*, 701 So.2d 329 (Fla. 1997) (victim strangled; three aggravators of HAC, CCP, and pecuniary gain, balanced against one statutory mitigator and four nonstatutory mitigators); *Carter v. State*, 576 So. 2d 1291, 1293 (Fla. 1989), (three aggravating circumstances far outweighed the nonstatutory mitigation); *Bates v. State*, 750 So. 2d 6, 12 (Fla.

1999) (holding death penalty proportionate in stabbing death where the court found three aggravators, including that the murder was committed during kidnaping and sexual battery, was committed for pecuniary gain, and HAC, versus two statutory mitigators and several nonstatutory mitigators and where testimony also indicated some neurological impairment of defendant); *Spencer v. State*, 691 So. 2d 1062, 1066 (Fla.1996) (holding death penalty proportionate where the victim was beaten and stabbed and the court found two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus drug and alcohol abuse and paranoid personality); *Mansfield v. State*, 758 So. 2d 636 (Fla.2000) (death penalty deemed proportional where HAC and crime committed during the commission of a sexual battery aggravators found, and five nonstatutory mitigating circumstances found); *Sliney v. State*, 699 So. 2d 662 (Fla. 1997) (finding the death penalty proportional where the murder occurred during a robbery and murder was committed to avoid arrest, two statutory mitigators existed, and a number of nonstatutory mitigators applied).

Sufficiency of the evidence. Although not raised by Russ, this Court will always review 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). In the present case, Russ pled guilty. When 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)). There is no claim the guilty plea was involuntary or the plea colloquy was deficient. In fact, a review of the record shows that the trial judge conducted a complete colloquy and that the plea was quite voluntary.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **JAMES WULCHAK**, Assistant Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118 on this _____ day of June, 2010.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

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