Electronically Filed 04/01/2013 12:01:48 PM ET

RECEIVED, 4/1/2013 15:08:32, Thomas D. Hall, Clerk, Supreme Court

In the Supreme Court of Florida

DAVID KELSEY SPARRE,

Appellant,

v. CASE NO. SC12-891

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, David Kelsey Sparre, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the direct appeal of a capital case. Sparre murdered the victim, who he met on Craiglist, by stabbing her over eighty times. He did it for the "rush." The jury recommended death unanimously. The trial court found two aggravators including HAC and sentenced Sparre to death.

Procedural history

The Grand Jury indicted David Kelsey Sparre for one count of murder. (T. Vol. 1 20-22). The indictment charged that Sparre, on or between July 8, 2010 and July 12, 2010, murdered Tiara Pool by stabbing her with a knife. The State gave notice of its intent to seek the death penalty pursuant to rule 3.202. (R. Vol. 1 23).

Guilt phase

At trial, Sparre was represented by Assistant Public Defender Refik Eler, who is a death qualified attorney. (R. Vol. 1 24).[1] The Honorable Elizabeth Senterfitt presided. The guilt phase was conducted on November 28, 2011 through December 2, 2011. (T. Vol. 6-12).

Following jury selection, the prosecutor presented opening statements. (T. Vol. 7 399-Vol. 8 404-422). Prior to defense counsel's opening statement, the trial court conducted a colloquy with Sparre regarding the strategy of conceding to second-degree

[1] Several other Assistant Public Defenders including Michael Bateh, Alphonse Perkins, and Shawn Arnold assisted Mr. Eler in representing Sparre at trial .

murder in opening statement. (T. Vol. 8 422-423). On the record and under oath, Sparre agreed to the strategy. (T. Vol. 8 423-424). Defense counsel Bateh then conceded in opening that Sparre committed the murder but argued it was second-degree murder, not first-degree murder. (T. Vol. 8 425-435). Defense counsel told the jury: "David Kelsey Sparre killed Tiara Pool. Your job this week is to determine what degree." (T. Vol. 8 434). Defense counsel argued that the murder was not premeditated asserting that Sparre snapped when the victim revealed she was married, not divorced. (T. Vol. 8 430-431).

The State presented 14 witnesses in the guilt phase: Michelle Edwards; Wesley Brown; Deborah Brookins; Michael Pool; Patrick Bodine; Karen Mildrodt; James Childers; Christie Upton; Richard Kocik; Jason Hitt; Kevin Noppinger; John Simpson; Ashley Chewning; and Dr. Jesse Giles. The State rested. (T. Vol. 11 1058).

Defense counsel moved for judgment of acquittal arguing that because the entry into the victim's apartment was consensual, there was no burglary for the felony murder theory and that there was no evidence of premeditation. (T. Vol. 11 1059- 1065). The trial court denied the motion. (T. Vol. 11 1070).

The defense did not present any witnesses. (T. Vol. 11 1070-1071). Sparre, under oath, agreed with the decision not to present any defense. (T. Vol. 11 1071-72). The defendant did not testify. The trial court conducted a colloquy regarding the defendant's right to testify informing Sparre that the decision to testify was his personally to make. (T. Vol. 11 1072-1074). The defense rested. (T. Vol. 11 1074, 1083).

Defense counsel renewed the motion for judgment of acquittal without additional argument. (T. Vol. 11 1074). The trial court denied the renewed motion. (T. Vol. 11 1074). The trial court conducted a jury instruction conference. (T. Vol. 11 1074-1082;1168-1174).

The prosecutor and defense counsel presented closing arguments of the guilt phase. (T. Vol. 11 1084-1118; 1118-1149;1150-1166). The defense argued that the murder was not premeditated asserting that Sparre had no plan to kill the victim prior to the murder. The defense argued that the murder was a second-degree murder. (T. Vol. 11 1123,1126).

The trial court instructed the jury. (T. Vol. 11 1175-1196; R. Vol. 4 594-622 - written jury instructions.). The trial court instructed the jury on 1) first-degree premeditated murder; and 2) first-degree felony murder with burglary as the underlying felony. The trial court instructed the jury on the lesser included offenses second-degree murder and manslaughter. The trial court excused the alternate jurors, Ms. Johnson and Ms. Kick, from deliberations but explained that it was possible that they could be needed for the penalty phase. (T. Vol. 11 1196-1197).

The jury began deliberations at 9:42 a.m. (T. Vol. 11 1198). The jury returned at 10:16 a.m. (T. Vol. 12 1204). The jury convicted Sparre by special verdict of both premeditated murder and felony murder with burglary being the underlying felony. (T. Vol. 12 1204; R. Vol. 3 592). The special verdict found both burglary and that Sparre carried, displayed, used, threatened to use, or

attempted to use a weapon. (R. Vol. 3 592). The clerk polled the jury. (T. Vol. 12 1205-1206).

Penalty phase

On December 13, 2011, the trial court conducted the penalty phase. (T. Vol. 15). Defense counsel Eler alerted the trial court that although they were ready to present numerous mitigation witnesses, Sparre indicted to them that he did not want any mitigation case presented. (T. Vol. 15 1235). Defense counsel Eler told the trial court that there was substantial mitigation they were prepared to present including mental mitigation. (T. Vol. 15 1235). Defense counsel also argued that he would have presented that the defendant has no significant criminal history as mitigation. (T. Vol. 15 1237).

Defense counsel Eler represented that there were four mental health experts that would testify as to mental mitigation. (T. Vol. 15 1236). Dr. Harry Krop was prepared to testify as to the two statutory mental mitigating circumstance of extreme mental or emotional disturbance and the capacity to appreciate the criminality of his conduct was substantially impaired. (T. Vol. 15 1237,1239). Dr. Krop would testify as to five diagnoses of ADHD; posttraumatic stress disorder; substance abuse; intermittent explosive disorder; and bipolar schiziod effective disorder. (T. Vol. 15 1237). Dr. Buffington, a pharmacologist was prepared to testify that Hydrocodone could cause blackouts. (T. Vol. 15 1238). Defense counsel Eler also represented that both Dr. Alligood and Dr. Greenberg were prepared to testify regarding Sparre's PTSD

dating from the time in was in a boy's home, Tara Hall, when he was 11, 12, or 13 years old. (T. Vol. 15 1238).

Defense counsel Eler also represented that Shannon Bullock, a missionary and counselor at Tara Hall School for Boys in South Carolina, would testify as to the defendant's dysfunctional family and mother's lack of interest in him. (T. Vol. 15 1240). Mr. Bullock would have testified that Sparre did well at the school. (T. Vol. 15 1240).

Defense counsel Eler also referred to family members who were prepared to testify. (T. Vol. 15 1235). Defense counsel Arnold listed Nissa Sparre, the defendant's sister as a mitigation witness, who would testify as to their terrible upbringing, including physical and emotional abuse. (T. Vol. 15 1241). Defense counsel Arnold also listed Mary Kay Tyson, the defendant's maternal aunt, who was a witness to much of the abuse, who would testify that the kids had an awful life. (T. Vol. 15 1241-1242). Defense counsel Arnold also listed Gladys Sparre and Fred Sparre, who were prepared to testify as to the defendant's father lack of involvement. (T. Vol. 15 1242)

Defense counsel Leombruno listed three witnesses that were prepared to testify in mitigation. Rhonda Hickcox, Sparre's mother, who had been married seven times, would testify that some of those husbands were abusive to Sparre and that in the two years Sparre was in the boy's home she only visited him one time. (T. Vol. 15 1243-1244). He also listed Mary Varnadore, Sparre's grandmother. (T. Vol. 15 1244-1245). He also listed Mr. Dunn, the director of Tara Hall, who would testify as to the lack of family

contact Sparre had, while at the school. (T. Vol. 15 1245). Mr. Dunn reported Sparre's mother to the South Carolina authorities for her lack of response and communication. (T. Vol. 15 1245-1246).

Defense counsel Eler also referred to two mitigation specialists, David Douglas and Dan Roberts. (T. Vol. 15 1246). Defense counsel Eler admitted that there were some possible disadvantages to presenting Dr. Krop regarding revealing prior bad acts but felt that the disadvantages were relatively minor compared to the diagnoses Dr. Krop would provide. (T. Vol. 15 1247). Counsel explained that Sparre was concerned about the stress on his family. (T. Vol. 15 1247).

The trial court placed Sparre under oath and conducted a waiver colloquy. (T. Vol. 15 1248-1259). The trial court explained to the defendant that there were four possible aggravating circumstances and that he would be waiving three statutory mitigating circumstances including no significant criminal history and the two statutory mental mitigators. (T. Vol. 15 1250-1252). Defense counsel also informed the trial court Sparre wanted arguments presented that his attorneys, Mr. Eler and his "four very competent co-counsel," believed should not be presented. (T. Vol. 15 1254). Defense counsel Arnold informed the trial court that Sparre's grandmother had written Sparre a note stating that she was fine and ready to testify. (T. Vol. 15 1259). The trial court found the waiver of the right to present mitigation to be knowingly, freely, and voluntarily entered. (T. Vol. 15 1259).

Defense counsel Eler then waived opening argument in the penalty phase. (T. Vol. 15 1259). Sparre agreed to the waiver of opening

statement. (T. Vol. 15 1259). The prosecutor then also waived opening statement in the penalty phase. (T. Vol. 15 1260).

Defense counsel objected to both the pecuniary gain and the CCP aggravators. (T. Vol. 15 1253). The prosecutor withdrew both those aggravators. (T. Vol. 15 1271).

The State presented three victim impact witnesses, who read prepared statements to the jury. (T. Vol. 15 1275-1287). Michael Pool, the victim's husband, testified that his wife and mother of his children was a beautiful woman with a beautiful soul. (T. Vol. 15 1275-1279). His being in the Navy forced him to send the boys, Kanyon and Cadon, to live with his parents. (T. Vol. 15 1277). And that both boys will grow up without their mother. (T. Vol. 15 1278). Thelma Summers, Michael Pool's grandmother, testified that she was helping raise the boys. (T. Vol. 15 1280-1282). She testified that Tiara was a devoted mother. (T. Vol. 15 1282). Valerie Speed, the victim's aunt, testified. (T. Vol. 15 1283-1287). The State rested. (T. Vol. 15 1287).

Defense counsel informed the trial court that Sparre again would not allow him to call any witnesses in mitigation. (T. Vol. 15 1288). The trial court conducted a second colloquy with Sparre concerning his right to present mitigation evidence and to testify on his own behalf during the penalty phase. (T. Vol. 15 1288-1292).

Defense counsel Eler asserted that Sparre was entitled to the no-significant-criminal-history mitigator as a matter of law. (T. Vol. 15 1292). The prosecutor disagreed noting that Sparre beat up his former girlfriend and that Sparre had some problems in the Army. (T. Vol. 15 1292). Defense counsel argued that Sparre had no

arrest and that while he had a domestic dispute with his girlfriend and An Article 15 in the military regarding lying about having a day off, they were not significant. (T. Vol. 15 1293). The prosecutor disputed the characterization of the Article 15 which involved a fight. (T. Vol. 15 1294). Defense counsel pointed out that Sparre has no arrests. (T. Vol. 15 1295). The prosecutor referred to Sparre having shot dogs and ran over a cat with a lawnmower. (T. Vol. 15 1296). The prosecutor also referred to another prior murder. (T. Vol. 15 1296-1297). Defense counsel withdrew the request for the no-significant-criminal-history mitigator. (T. Vol. 15 1297,1300). The prosecutor noted that Sparre told Dr. Krop that he would find a stray animal and hurt it. (T. Vol. 15 1299). The trial court ruled that if defense counsel introduced evidence regarding the no-significant-criminal-history mitigator, she would allow the prosecutor to elicit testimony about intentionally hurting animals to relieve stress. (T. Vol. 15 1301). Sparre agreed to withdrawing the no-significant-criminal-history mitigator. (T. Vol. 15 1302-1303).

The trial court conducted a penalty phase jury instruction conference. (T. Vol. 15 1303-1334). The trial court agreed to give the mental mitigation jury instruction. (T. Vol. 15 1303). And the age mitigating instruction. (T. Vol. 15 1304). The trial court agreed to give the non-statutory mitigating instruction and allow counsel to argue for several general mitigators such as good at fixing things. (T. Vol. 15 1306-1326).

The trial court confirmed Sparre's waiver of mitigation and his desire not to testify at the penalty phase. (T. Vol. 15 1336-1338).

The prosecutor gave closing argument of the penalty phase arguing for both the HAC and the felony murder aggravators. (T. Vol. 15 1339-1372). Defense counsel also gave closing argument. (T. Vol. 15 1373-1392).

The trial court instructed the jury on two aggravating circumstances of felony murder and HAC. (T. Vol. 15 1392-1404;1397). The trial court instructed the jury on the extreme mental or emotional disturbance statutory mitigator and the age statutory mitigator. (T. Vol. 15 1399). The trial court also instructed the jury on the general catch-all mitigation of "any other factors in the defendant's character, background or life." (T. Vol. 15 1399). The trial court gave special instructions on 17 special non-statutory mitigators. (T. Vol. 15 1400).

The jury began deliberations at 2:20 p.m. (T. Vol. 15 1404). The jury asked a question regarding the meaning of the eighth non-statutory mitigator that the incident was situational. (T. Vol. 15 1406). Defense counsel objected to the trial court giving any definition. (T. Vol. 15 1406). The prosecutor also objected. (T. Vol. 15 1406-1407). The trial court instructed the jury that there was no additional definition. (T. Vol. 15 1409). The jury returned at 3:27 p.m. (T. Vol. 15 1409).

The jury unanimously recommended a death sentence. (T. Vol. 15 1410;R. Vol. 4 628). The penalty phase jury was polled. (T. Vol. 15 1410-1412). The trial court ordered a PSI. (T. Vol. 15 1414; R. Vol. 4 704). The trial court also requested sentencing memorandums. (T. Vol. 15 1418). The trial court informed Sparre

that during the *Spencer* hearing,[2] he could present mitigation just to the trial court and to speak with his attorneys regarding that option. (T. Vol. 15 1418).

***Spencer* Hearing**

On January 27, 2012, the trial court conducted a *Spencer* hearing. (R. Vol. 5 956). Defense counsel Bateh informed the trial court that Sparre also refused to allow the defense to present mitigation at the *Spencer* hearing. (R. Vol. 5 958). Defense counsel informed the trial court that the mitigation evidence that they would have presented at the Spencer hearing is the same as the mitigation evidence they would have presented at the penalty phase with the addition of Virginia Evans. (R. Vol. 5 958). The trial court conducted another waiver of mitigation colloquy. (R. Vol. 5 960-962).

Defense counsel had no objections to the PSI. (R. Vol. 5 962). The prosecutor sought to correct Sparre's military background contained in the PSI to include a fight. (R. Vol. 5 963-964). The trial court stated that she did not intend to consider the recommendation as to the sentence from the Department of Corrections. (R. Vol. 5 964-965).

The state presented the additional testimony of two witnesses regarding a letter Sparre wrote. (R. Vol. 5 965). Defense counsel objected. (R. Vol. 5 966). The State presented Correctional

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

Officer Daisy Peoples (R. Vol. 5 967-971). She monitors letters sent out or received by inmates. (R. Vol. 5 967). The letter was dated January 2, 2012 and addressed to Dear Ashley. (R. Vol. 5 969). The envelope was addressed to Ashley Nicole Chewning. (R. Vol. 5 969).

The State presented Ashley Chewning. (R. Vol. 5 971). She testified that she recognized the handwriting of the letter as Sparre's handwriting. (R. Vol. 5 972).

Defense counsel argued the motion for new trial. (R. Vol. 5 973-977). The trial court denied the motion for new trial. (R. Vol. 5 977; R. Vol. 4 654-660). Defense counsel argued the motion for new penalty phase. (R. Vol. 5 977-979). The trial court denied the motion for new penalty phase (R. Vol. 5 979; R. Vol. 4 661-663).

The trial court requested sentencing memorandums be filed by February 10, 2012. (R. Vol. 5 981). The trial court conducted a colloquy with Sparre regarding his right to testify at the *Spencer* hearing. (R. Vol. 5 984-986).

The State wrote a sentencing memorandum. (R. Vol. 4 673-687). The State recounted the facts of the murder. (R. Vol. 4 673-678). The State noted that the trial court was prohibited from giving the jury's recommendation of death great weight because no mitigation was presented by the defense during the penalty phase. (R. Vol. 4 679). The State sought two aggravators: 1) the felony murder aggravator and 2) HAC. (R. Vol. 4 680-682). And argued that they should be given great weight. (R. Vol. 4 686). The State discussed the mitigating circumstances. (R. Vol. 4 682-686). The State argued against the extreme-mental-or-emotional-disturbance

mitigator. (R. Vol. 4 682-683). The State acknowledged that the statutory age mitigator applied but urged the trial court to give it little weight because the defendant was not an inexperienced young man. (R. Vol. 4 683). The state also discussed the non-statutory mitigators. (R. Vol. 4 68-686).

Sentencing

On March 30, 2012, the trial court conducted the sentencing hearing. (R. Vol. 5 988-1007). The trial court read portions of her written sentencing order. (R. Vol. 5 991-1006; R. Vol. 4 700-713 - sentencing order). The trial court noted that she ordered a PSI and that "this Court has carefully considered the entire record including the PSI in evaluating mitigating circumstances." (R. Vol. 5 1005).

The trial court found two aggravating circumstances: 1) HAC and 2) that the murder was committed during the course of a burglary, both of which the trial court gave great weight (R. Vol. 4 700-703).

The sole statutory mitigator, the defendant's age of 19 years old, was given moderate weight. (R. Vol. 4 705-706). The trial court explained its weighing decision regarding the age mitigating circumstance, noting that to be significantly mitigating, age must be "linked with some other characteristic" such as immaturity but the trial court found "no evidence of significant emotional immaturity." (R. Vol. 4 705-706). The trial court noted that

Sparre "had received his GED; had served in the Army National Guard for a year; and was a father." (R. Vol. 4 706).

The trial court also considered but rejected the statutory mitigating circumstance of extreme emotional disturbance. (R. Vol. 4 704-705). The trial court noted that defense counsel had proffered the testimony of three mental health experts, Dr. Krop, Dr. Greenberg, and Dr. Alligood, to establish that Sparre suffered from PTSD (R. Vol. 4 705, n.5). The trial court noted Sparre's efforts to conceal his involvement including cleaning up the crime and attempting to establish an alibi by sending a text to the victim. (R. Vol. 4 705). The trial court also observed that the defendant wrote in a letter that he wanted to murder someone just to see how it felt, all of which negated any claim of extreme emotional disturbance. (R. Vol. 4 705).

The trial court found 13 non-statutory mitigators: 1) the defendant accepts responsibility for his actions (little weight); 2) the defendant has been neglected (some weight); 3) the defendant suffers from emotional deprivation and was emotionally abused (some weight); 4) the defendant was physically abused by his step-father and mother (some weight); 5) the defendant lacks a good support system (some weight); 6) the defendant's father was absent from his life (some weight); 7) the defendant is good at fixing things (slight weight); 8) the defendant dropped out of high school but obtained a GED (little weight); 9) the defendant participated in ROTC in high school and was in the U.S. military (slight weight); 10) the defendant is devoted to his grandmother (little weight); 11) the defendant has a child (some weight); 12) the defendant

loves his family (some weight) and 13) the defendant's family loves him (some weight). (R. Vol. 4 706-711). The trial court considered but rejected, as not proven, other non-statutory mitigators including: 1) the defendant's judgment was impaired (B); 2) the defendant was under the influence of drugs (C); and 3) the incident was situational (G). (R. Vol. 4 707-708).

The trial court then concluded, based the "heinous nature of Tiara Pool's murder" that the "aggravating circumstances in this case far outweigh the mitigating circumstances" and the scales "tilt unquestionably to the side of death." (R. Vol. 4 712). The trial court explained that it was not giving the jury recommendation great weight because the defendant waived presentation of mitigation. (R. Vol. 4 711-712 & n.11). The trial court then sentenced the defendant to death. (R. Vol. 4 712).

SUMMARY OF ARGUMENT

ISSUE I

Sparre asserts that the trial court abused its discretion in not calling four mental health experts as its own witnesses when the defendant waived presentation of mitigation. Specifically, he claims that Dr. Krop, Dr. Buffington, Dr. Alligood, and Dr. Greenberg should have been called as court witnesses to testify as to mental mitigation despite Sparre's desire to waive mitigation. Sparre, however, waived this claim when he waived presentation of mitigation. A defendant cannot waive presentation of evidence and then claim on appeal, that the trial court erred in not require the presentation of that evidence.

ISSUE II

Sparre asserts that this Court should recede from *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), and mandate that the trial court appoint special counsel in every case where the defendant waives the presentation of mitigation. First, as a practical matter, any such mandate is unworkable. The source of most mitigation is the defendant himself and he will refuse to assist special counsel in uncovering mitigation if he is insisting on not presenting mitigation. Second, as a legal matter, such a mandate is unconstitutional. A defendant has a Sixth Amendment right to control the presentation of mitigation. This Court should not recede from *Hamblen*.

ISSUE III

Sparre advocates that this Court recede from its numerous cases holding that Florida's death penalty statutes does not violate *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court should not recede from its solid wall of precedent rejecting *Ring* claims. Appellant provides no reason for this Court to do so. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* is satisfied where the jury convicts a defendant in the guilty phase of a separate felony. The jury unanimously convicted Sparre of felony murder with armed burglary as the underlying felony. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Sparre's jury unanimously recommended a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY NOT CALLING FOUR MENTAL HEALTH EXPERTS AS ITS OWN WITNESSES WHEN THE DEFENDANT WAIVED PRESENTATION OF MITIGATION? (Restated)

Sparre asserts that the trial court abused its discretion in not calling four mental health experts as its own witnesses when the defendant waived presentation of mitigation. Specifically, he claims that Dr. Krop, Dr. Buffington, Dr. Alligood, and Dr. Greenberg should have been called as court witnesses to testify as to mental mitigation despite Sparre's desire to waive mitigation. Sparre, however, waived this claim when he waived presentation of mitigation. A defendant cannot waive presentation of evidence and then claim on appeal, that the trial court erred in not require the presentation of that evidence.

Standard of review

The standard of review of whether a trial court should call a witness as its own or appoint special counsel when a defendant waives the presentation of mitigation is abuse of discretion. *Muhammad v. State*, 782 So.2d 343, 364 (Fla. 2001)(stating that "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."). The trial court did not abuse its discretion.

Merits

In *Muhammad v. State*, 782 So.2d 343, 363-64 (Fla. 2001), this Court established the procedures a trial court should follow when a capital defendant waives presentation of mitigation. This Court mandated the trial court order a comprehensive presentence investigation report (PSI) and that the State place in the record all the records of a mitigating nature it possesses, "such as school records, military records, and medical records." The Court also explained that a trial court has the discretion to call persons with mitigating evidence as its own witnesses, if the PSI or other records alert the trial court to the probability of "significant mitigation" and the discretion to appoint special counsel to present mitigation. *See also Barnes v. State*, 29 So.3d 1010, 1023-1026 (Fla. 2010)(discussing *Muhammad* and concluding that the appointment of special counsel did not violate right to self-representation, distinguishing *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002), and following *State v. Reddish*, 859 A.2d 1173 (N.J. 2004)); *McCray v. State*, 71 So.3d 848, 879-880 (Fla. 2011)(clarifying *Muhammad* only applies if the defendant totally waives mitigation); *Russ v. State*, 73 So.3d 178, 189-91 (Fla. 2011)(rejecting a claim the trial court violate the strictures of *Muhammad* by not considering the information given during the *Koon* colloquy[3] and by not considering mental mitigation contained in the

[3] *Koon v. Dugger*, 619 So.2d 246, 250 (Fla. 1993)(establishing a prospective procedure to be followed when a defendant waives the presentation of mitigation against his counsel's advice, counsel must inform the court on the record of the defendant's decision and what mitigating evidence counsel's investigation uncovered and then

PSI because the PSI report did not alert the trial court "to the probability of significant mental mitigation.").

The trial court complied with *Muhammad*. She ordered a PSI and considered the mitigating information contained in the PSI. The trial court noted that she ordered a PSI and that "this Court has carefully considered the entire record including the PSI in evaluating mitigating circumstances." (R. Vol. 5 1005). For example, the trial court found the non-statutory mitigator that the defendant's father was absent from his life based on the information in the PSI. (R. Vol. 4 710). Moreover, the trial court, in her sentencing order, "lessened" any reliance on the jury unanimous recommendation of a death sentence and did not give that recommendation great weight because no mitigation evidence was presented during the penalty phase. (Vol. 4 711-712 citing *Muhammad*). Indeed, Sparre does not argue that the trial court violated *Muhammad*. Rather, Sparre asserts that this Court should embellish its procedures established in *Muhammad* and require a trial court to call as its own witnesses any mental expert referred to in the record.

This Court, however, has rejected this argument previously. In *Grim v. State*, 841 So.2d 455 (Fla. 2003), this Court rejected a claim that the trial court erred in not calling a mental health expert as its own witness. Grim waived presentation of mitigation.

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the trial court should then inquire of the defendant to establish his waiver of mitigation is knowingly made).

Grim, 841 So.2d at 459. The trial court ordered a presentence investigation report and appointed special counsel. Special counsel presented mitigation to the trial court during the sentencing hearing but not to the jury during the penalty phase. *Id.* at 459-60 & n.5. Special counsel presented the report of a mental health expert; the testimony of Grim's sister; and the testimony of two of Grim's work supervisors to the trial court during sentencing.

On appeal, Grim argued that the trial court should have required special counsel to present mitigation evidence to the penalty phase jury despite his waiver. *Grim*, 841 So.2d at 461-62. This Court, relying on *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), rejected that argument, observing that "competent defendants have a right to control their own destinies." This Court held that a trial court is not required to appoint special counsel for purposes of presenting mitigating evidence to a penalty phase jury if the defendant has knowingly and voluntarily waived the presentation of such evidence. *Id.* at 461.

Grim also asserted that the trial court abused its discretion in failing to call the mental health expert who wrote the report as its own witness to establish two mental statutory mitigating circumstances. This Court "disagreed." *Id.* at 462. This Court concluded that, because Grim waived the presentation of mitigation during the penalty phase in the present case, "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." *Id.* at 462 (citing *LaMarca v. State*, 785 So.2d 1209 (Fla. 2001)).

Here, as in *Grim*, the defendant waived presentation of mitigation. And, here, as in *Grim*, he waived any claim that the trial court erred in not calling experts to testify as to mitigation by doing so.

Appellate counsel contends that the trial court should have called Dr. Krop as a court witness to testify regarding ADHA; posttraumatic stress disorder; substance abuse; bipolar schizoaffective disorder; and intermittent explosive disorder. IB at 27; (T. Vol. 15 1237). Appellate counsel also asserts that the trial court should have called both Dr. Alligood and Dr. Greenberg to testify regarding Sparre's mental health history dating back to his time at Tara Hall. IB at 27-28. Additionally, appellate counsel asserts that the trial court should have called as court's witnesses members of Sparre's family and staff, including the director of Tara Hall, to testify regarding abuse Sparre suffered at Tara Hall when he was 11-13 years old. IB at 28. This is a blatant plea for the judge to conduct her own penalty phase in direct contravention of the defendant's wishes and waiver.

Harmless error

The error, if any, in not calling these experts to testify as court witnesses at a *Spencer* hearing was harmless. Dr. Buffington, a pharmacologist, would have testified regarding Sparre's long-term illegal drug and alcohol abuse. IB. at 31. Sparre admitted during his confession, that the was not on drugs at the time of the

murder. (T. Vol. 10 951). He only took the eight Hydrocodone pills that the victim had in her purse after the murder. (T. Vol. 10 952). And, as courts have recognized, such testimony may not be viewed as mitigating by either a jury or a judge. *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999)(observing that alcohol and drug abuse "is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing.").

This is even more true of Dr. Krop's diagnosis of intermittent explosive disorder. Intermittent explosive disorder is described in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), as one in which the person "recurrently fails to resist impulsive aggressive destruction of property or assault of other persons far in excess of what might be considered appropriate with respect to any precipitating event." Intermittent explosive disorder, like antisocial disorder, is basically "fancy language for being a murderer." *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000)(describing a diagnosis of "antisocial personality disorder" as being "fancy language for being a murderer."). And a judge is just as likely to take that view as a jury - Judge Posner certainly did.

Dr. Krop's testimony also had another significant downside. In the interview with Dr. Krop, Sparre admitted to having shot dogs and ran over a cat with a lawnmower. (T. Vol. 15 1296). The prosecutor noted that Sparre told Dr. Krop that he would find a stray animal and hurt it to deal with his anger. (T. Vol. 15 1299). Torturing animals is hardly mitigating.

The judge would have still viewed Sparre's letter admitting murdering this woman and the mother of two children for the thrill of it, or, in the defendant's own words, for the "rush" of doing so, as negating any testimony regarding mental mitigation given by Dr. Krop or the other mental health experts. Even if these witnesses had been presented as court witnesses, the judge still would have sentenced Sparre to death.

ISSUE II

WHETHER THIS COURT SHOULD MANDATE THE APPOINTMENT OF SPECIAL COUNSEL TO PRESENT MITIGATION IN EVERY CASE WHERE THE DEFENDANT WAIVES PRESENTATION OF MITIGATION? (Restated)

Sparre asserts that this Court should recede from *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), and mandate that the trial court appoint special counsel in every case where the defendant waives the presentation of mitigation. First, as a practical matter, any such mandate is unworkable. The source of most mitigation is the defendant himself and he will refuse to assist special counsel in uncovering mitigation if he is insisting on not presenting mitigation. Second, as a legal matter, such a mandate is unconstitutional. A defendant has a Sixth Amendment right to control the presentation of mitigation. This Court should not recede from *Hamblen*.

Standard of review

The standard of review of whether a trial court should appoint special counsel is abuse of discretion. *Farr v. State*, 656 So.2d 448, 450 (Fla. 1995)(explaining that while trial courts have discretion to appoint special counsel where it may be deemed necessary, there is no error in refusing to do so and finding no error in the fact that no special counsel was appointed to present mitigation).

Merits

In *Hamblen v. State*, 527 So.2d 800, 803-04 (Fla. 1988), this Court held that a capital defendant has the right to waive the presentation of mitigation. Hamblen pled guilty and a penalty phase jury. *Id.* at 801. He represented himself at sentencing. *Id.* He presented no evidence of mitigation and commented that the prosecutor "has correctly assessed my character, and certainly ... has established the aggravated nature of the crime. Therefore, I feel his recommendation of the death penalty is appropriate." *Id.* at 802. Appellate counsel argued the special counsel must be appointed to present mitigation regardless of the defendant's wishes in every capital case.

On appeal, Hamblen, now represented by counsel, argued "that the uniqueness of capital punishment demands that a defense to a death sentence be mounted, irrespective of the wishes of the defendant." This Court declined to adopt such a policy because "Hamblen had a constitutional right to represent himself, and he was clearly competent to do so." *Id.* at 804. This Court explained that to allow counsel to take a position contrary to his wishes through the vehicle of special counsel "would violate the dictates of *Faretta* [*v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)]." This Court acknowledged that "death is different," but observed, "in the final analysis, all competent defendants have a right to control their own destinies." *Id.*

Appellate counsel urges this Court recede from *Hamblen v. State*, 527 So.2d 800 (Fla. 1988), and advocates not only that special counsel be appointed but that any witnesses with information

regarding mitigation be called as court witnesses. In others words, she advocates that a capital defendant not be allowed to waive the presentation of mitigation.

This Court rejected an invitation to recede from *Hamblen* in *Ocha v. State*, 826 So.2d 956, 964 (Fla. 2002). On appeal, Ocha contended that this Court's holding in *Klokoc v. State*, 589 So.2d 219 (Fla. 1991), conflicted with *Hamblen*. This Court found no conflict, concluding that *Klokoc* was "entirely consistent" with *Hamblen*. This Court explained that, while a competent defendant may direct his own defense at trial, including waiving the presentation of mitigation, he does not direct the appeal and appellate counsel may be appointed against his wishes. This Court's distinction between trials and appeals was later endorsed by the United States Supreme Court in *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), which held that defendants have no right to self-representation on appeal. A capital defendant may control the case by exercising his right of self-representation at the trial level but he does not control the appeal because he has no right of self-representation at the appellate level. See also *Farr v. State*, - So.3d -, -, 2012 WL 5950388, 2, n.3 (Fla. Nov. 29, 2012)(observing that this Court had rejected an argument *Hamblen* had been modified by more recent decisions, explaining that *Klokoc v. State*, 589 So.2d 219 (Fla. 1991), "did not modify the core holding in *Hamblen* that there is no constitutional requirement that such a procedure be followed.").

While admittedly a conundrum, appellate counsel's plea for a uniform procedure and "full" adversarial proceeding is in vain.

Her solution of mandating the appointment of special counsel in all cases where a defendant waives the presentation of mitigation is unworkable. The source of most mitigation is the defendant himself and a defendant who does not want mitigation presented will simply refuse to assist special counsel. *Russ v. State*, 73 So.3d 178, 191 (Fla. 2011)(noting the defendant refused to cooperate with special counsel appointed pursuant to *Muhammad* by refusing to participate in a mental health evaluation and a PET scan). Additionally, it will provoke such a defendant to exercise his right of self-representation established in *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). And it may well be unconstitutional.

In *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the Court held that stand-by counsel did not violate the right of self-representation. But the *McKaskle* Court observed that the right to proceed pro se "may be undermined by unsolicited and excessively intrusive participation by standby counsel" and noted that "multiple voices for the defense will confuse the message the defendant wishes to convey, thus defeating *Faretta*'s objectives." *McKaskle*, 465 U.S. at 177, 104 S.Ct. at 950. The Court then noted that a "pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury" because that "is the core of the *Faretta* right." *McKaskle*, 465 U.S. at 178, 104 S.Ct. at 951. "If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak instead of the

defendant on any matter of importance, the *Faretta* right is eroded." *Id.*

Appointed special counsel will be "substantially" interfering with the defendant's decision not to present mitigation and special counsel will be speaking "instead of the defendant" on a matter of great "importance" - that of mitigation - all of which is contrary to *McKaskle*. Mandating the appointment of special counsel undermines the entire reasoning of *Faretta*. Indeed, appellate counsel's argument regarding ensuring fairness and reliability reads like the dissents in *Faretta*. *Faretta*, 422 U.S. at 839-840, 95 S.Ct. at 2543 (Burger, C.J., dissenting)(explaining that prosecutors and judges have a "duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial" and "[t]hat goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel" and stating it is a "lame explanation that the defendant simply availed himself of the freedom to go to jail under his own banner" and stating that the criminal justice system "should not be available as an instrument of self-destruction."); *Faretta*, 422 U.S. at 851, 95 S.Ct. at 2549 (Blackmun, J., dissenting)(noting that "obvious dangers of unjust convictions" resulting from allowing pro se representation).

Certain Justices of this Court have also advocated the appointment of special counsel in these types of cases. *Muhammad v. State*, 782 So. 2d 343, 371 (Fla. 2001)(Pariente J. concurring)(advocating requiring the appointment of special counsel

to present mitigation when a defendant waives presentation of mitigation). The concurrence notes the "friction between an individual's right to control his destiny and society's duty to see that executions do not become a vehicle by which a person could commit suicide." *Muhammad*, 782 So.2d at 369. But that friction was resolved by *Faretta*. The United States Supreme Court basically held in *Faretta* that the "individual's right to control his destiny" trumped society's interest. The concurrence observes that the defendant has already been convicted by the time of the penalty phase. *Muhammad*, 782 So.2d at 370 (stating: "[a]s with an appeal, during the penalty phase of a capital trial, the defendant has already been convicted."). But *Faretta* and the right of self-representation extend to sentencing and to the penalty phase of a capital trial. *United States v. Davis*, 285 F.3d 378, 385 (5th Cir. 2002)(holding the right to self-representation extends to the penalty phase of a capital case and holding that district court's decision to appoint independent counsel to present mitigation for a pro se defendant violated the Sixth Amendment right to self-representation); *Silagy v. Peters*, 905 F.2d 986, 1007-08 (7th Cir. 1990)(holding that the right to self-representation applies in capital sentencing proceedings citing *Blystone v. Pennsylvania*, 495 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and rejecting a claim that the *Faretta* right of self-representation must yield to the "societal interest of ensuring that death is the appropriate sentence."). A defendant retains the right to waive the presentation of mitigation at the penalty phase after his conviction during the guilt phase. Nor does the concurrence

explain how such a procedure would comply with *McKaskle* or *Faretta*. *Muhammad*, 782 So.2d at 368 (Harding, concurring)(noting "in exercising the discretion to appoint its own counsel or standby counsel, the trial court should be careful not to undermine the defendant's Sixth Amendment right to self-representation and to be the captain of his or her own ship."); *Muhammad*, 782 So.2d at 372 (Wells, C.J., concurring)(noting that appointing special counsel would violate *Faretta*). While this Court understandably wants mitigation presented, violating *Faretta* is not an option.

This case highlights another problem with forcing the defendant to present mitigation against his wishes which is the problem of the resulting impeachment. Dr. Krop's testimony had a significant downside. In the interview with Dr. Krop, Sparre admitted to having shot dogs and to running over a cat with a lawnmower. (T. Vol. 15 1296). The prosecutor noted that Sparre told Dr. Krop that he would find stray animals and hurt them to deal with his anger. (T. Vol. 15 1299). Torturing animals is hardly mitigating. If the Court had, in effect, forced Sparre to present Dr. Krop and the prosecutor then cross-examined Dr. Krop and elicited this damaging information, that certainly would have been raised on appeal as a violation of *Faretta* and probably the right to a fair trial, as well.

Sparre's reliance on *Barnes v. State*, 29 So.3d 1010 (Fla. 2010), is misplaced. IB at 42. This Court did not recede from *Hamblen* in *Barnes*. *Barnes*, 29 So.3d at 1022-28. Nor did the *Barnes* Court resolve the conflict between *Faretta*/*McKaskle* and *Muhammad*. Indeed, this Court cannot resolve that conflict, only the United

States Supreme Court can do that. The *Barnes* Court merely observed that the right of self-representation established in *Faretta* "is not absolute." *Id.* at 1025 (quoting *Indiana v. Edwards*, 554 U.S. 164, 171, 128 S.Ct. 2379, 2384, 171 L.Ed.2d 345 (2008)). This Court concluded that "Barnes' right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case." *Barnes*, 29 So.3d at 1026. The tension between *Faretta*/*McKaskle* and *Muhammad* remains. And appellate counsel's argument that this Court should recede from *Hamblen* and mandate the appointment of special counsel to present mitigation to the jury in every capital case, regardless of the defendant's wishes, will only increase that tension.

This Court's current policy of requiring a detailed and comprehensive PSI and requiring the trial court to consider all the mitigation in that PSI is a proper balance and is unlikely to be viewed as violating *Faretta*. *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949)(stating sentencing judges should have "the fullest information possible concerning the defendant's life and characteristics"). But mandating the appointment of special counsel in every capital case is likely to be viewed as violating *Faretta*. This Court should not recede from *Hamblen*.

Harmless error

The error, if any, in not appointing special counsel to present mitigation to the jury was harmless. Dr. Buffington, a pharmacologist, would have testified regarding Sparre's long-term

illegal drug and alcohol abuse. But, as courts have recognized, a jury can view such testimony as not being mitigating. *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir. 1999)(observing that alcohol and drug abuse "is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing.").

This is even more true of Dr. Krop's diagnosis of intermittent explosive disorder. Intermittent explosive disorder is described in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), as one in which the person "recurrently fails to resist impulsive aggressive destruction of property or assault of other persons far in excess of what might be considered appropriate with respect to any precipitating event." Intermittent explosive disorder, like antisocial disorder, is basically "fancy language for being a murderer." *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000)(describing a diagnosis of "antisocial personality disorder" as being "fancy language for being a murderer."). And such a diagnosis raises the specter of future dangerousness. *Williams v. Branker*, 462 Fed.Appx. 348, 355, 2012 WL 165035, 6 (4th Cir. 2012)(affirming the dismissal of a § 1983 action against prison officials and characterizing a diagnosis of "intermittent explosive disorder" as being one of "potentially violent" which would put "others, including inmates and staff, at risk of harm."). While a prosecutor cannot use future dangerousness as aggravation, a prosecutor can use future dangerousness as rebuttal to mitigation under *Zack v. State*, 911 So.2d 1190, 1208-09 (Fla. 2005). The end result would be the same. If Dr. Krop had testified regarding his diagnosis of "intermittent explosive disorder," the prosecutor

could have explained that diagnosis on cross-examination by having Dr. Krop read the DSM to the jury and then the prosecutor could have argued Sparre's likely future dangerousness in prison, in closing in support of an argument that the defendant should be sentenced to death, not merely be sentenced to life where he could harm prison guards.

Moreover, the jury, like the judge, was likely to view Sparre's letter admitting murdering this woman and the mother of two children for the thrill of it, or, in the defendant's own words, for the "rush" of doing so, as negating any testimony regarding mental mitigation given by Dr. Krop or the other mental health experts. Even if these witnesses had been presented at the penalty phase by special counsel, the jury still would have recommended death.

ISSUE III

WHETHER THIS COURT SHOULD RECEDE FROM ITS EXTENSIVE PRIOR PRECEDENT THAT FLORIDA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL? (Restated)

Sparre advocates that this Court recede from its numerous cases holding that Florida's death penalty statutes does not violate *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court should not recede from its solid wall of precedent rejecting *Ring* claims. Appellant provides no reason for this Court to do so. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* is satisfied where the jury convicts a defendant in the guilty phase of a separate felony. The jury unanimously convicted Sparre of felony murder with armed burglary as the underlying felony. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Sparre's jury unanimously recommended a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial.

The trial court's ruling

Sparre filed a "motion to declare Florida's capital sentencing procedure unconstitutional under *Ring v. Arizona*" arguing the fact-finding necessary to impose a death sentence is done by the trial court and that any fact-finding by the jury was not statutorily

mandated. (R. Vol. 2 377-391). The motion also argued that simple majority vote violated the requirement of a substantial majority announced in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). (R. Vol. 2 383-83).[4] Sparre also argued that the jury was not required to find the same particular aggravating circumstances or to details its findings regarding the aggravating circumstances by special verdict (R. Vol. 2 383-84). And Sparre contended that the indictment failed to specify any aggravating circumstances. (R. Vol. 2 384-5). Sparre also filed a motion to declare Florida death penalty statute unconstitutional under *Evans v. McNeil* and a memorandum of law in support of that motion relying on a southern district court's ruling in *Evans v. McNeil*, 2011 WL 9717450 (S.D.Fla. Jun 20, 2011)(No. 08-14402-CIV). (T. Vol. 3 536-537; 530-535).

The jury convicted Sparre of both premeditated murder and felony murder with burglary with a weapon being the underlying felony during the guilt phase. (T. Vol. 3 592). The jury also recommended death unanimously. (T. Vol. 4 628).

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[4] Actually, the "substantial majority" language is from *Johnson v. Louisiana*, 406 U.S. 356, 362, 92 S.Ct. 1620, 1625, 32 L.Ed.2d 152 (1972), which is a due process case, not Apodaca. Sparre lacks standing to challenge a death sentence based on less than a unanimous vote because his jury unanimously recommended death. *Burch v. Louisiana*, 441 U.S. 130, 132, n.4, 99 S.Ct. 1623, 1624, n.4, 60 L.Ed.2d 96 (1979)(observing that a defendant who was convicted by a unanimous jury lacks standing to challenge the constitutionality of the state law allowing conviction by a non-unanimous jury).

Preservation

The record does not reveal whether the issue was properly preserved. Sparre filed a motion raising the *Ring* claim. Indeed, he filed two motions and a memo but it is unclear whether he obtained a ruling from the trial court on either motion. *Baker v. State*, 71 So.3d 802, 814 (Fla. 2011)(explaining to be preserved, the issue or legal argument must be raised and ruled on by the trial court quoting *Rhodes v. State*, 986 So.2d 501, 513 (Fla. 2008) and § 924.051(1)(b), (3), Fla. Stat.). The record on appeal does not contain the trial court's order denying the two motions. Appellant has the burden of establishing that the trial court ruled on his motions. *Mollinea v. Mollinea*, 77 So.3d 253, 254 (Fla. 1st DCA 2012)(affirming the trial court's order because the written order was not included in the record on appeal and explaining whether the record on appeal is insufficient for the appellate court to review the ruling, the appellate court will affirm citing *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979)).

Standard of review

The standard of review is *de novo*. Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute *de novo*" regarding a Sixth Amendment challenge to Florida's death penalty scheme).

Merits

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Supreme Court, in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), held that the Sixth Amendment requires that aggravating factors, necessary under Arizona law for imposition of the death penalty, be found by a jury. *Ring* was the application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to capital cases. Arizona's death penalty statute, which was at issue in *Ring*, was judge-only capital sentencing. Florida's death penalty statute, in contrast, as the *Ring* Court itself noted, is a hybrid system involving both a judge and a jury. *Ring*, 536 U.S. at 608, n.6, 122 S.Ct. at 2442, n.6 (noting that Arizona, like Colorado, Idaho, Montana and Nebraska, "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges" and noting that four States, Alabama, Delaware, Florida and Indiana, "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determinations."). Florida's scheme is jury plus judge sentencing, not judge only sentencing.

This Court has repeatedly, over the years, rejected *Ring* challenges to Florida's death penalty scheme. As this Court has

recently noted: "we have repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." *Ault v. State*, 53 So.3d 175, 205-206 (Fla. 2010)(rejecting a *Ring* challenge to Florida's death penalty scheme citing *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002)). Kaczmar provides no reason for this Court to recede from this solid wall of precedent.

The United States Supreme Court, in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring,* explained that Florida's death penalty does not violate the Sixth Amendment. It was a footnote in *Jones* stating "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," that essentially became the holding in *Apprendi*. *Jones*, 526 U.S. at 243 n.6.[5] The

[5] Minus the language in *Jones* regarding the indictment clause because the federal indictment clause does not apply to the states. *Hurtado v. California*, 110 U.S. 516, 538, 4 S.Ct. 111, 28 L.Ed. 232 (1884)(holding that the Indictment Clause of the Fifth Amendment is not incorporated against the states via the Due Process Clause); *Branzburg v. Hayes*, 408 U.S. 665, 688 n. 25, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)). This Court has repeatedly reject claims that the aggravator must be listed in the indictment. *Pham v. State*, 70 So.3d 485, 496 (Fla. 2011)(stating that "this Court has repeatedly rejected the argument that aggravating circumstances must be alleged in the indictment" citing *Coday v. State*, 946 So.2d 988, 1006 (Fla. 2006); *Ibar v. State*, 938 So.2d 451, 473 (Fla. 2006); *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003); *Kormondy v. State*, 845 So.2d 41, 54 (Fla. 2003); and *Rogers v. State*, 957 So.2d 538, 554 (Fla. 2007)).

Jones Court explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. The *Jones* Court explained that in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), a Florida capital case, a jury made a sentencing recommendation of death, thus "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 251, 119 S.Ct. at 1228. *See also State v. Steele*, 921 So.2d 538, 546 (Fla. 2005)(explaining that a finding of an aggravator "is implicit in a jury's recommendation of a sentence of death" citing *Jones*). A jury in Florida is instructed that they may not recommend death unless they find an aggravator. So, a jury that recommends death has necessarily found at least one aggravator. According to both the United States Supreme Court in *Jones* and the Florida Supreme Court in *Steele*, a jury's recommendation of death means the jury found an aggravator which is all *Ring* requires.

Sparre's jury unanimously recommended death. His jury necessarily found at least one aggravator in order to recommend death. There can be no violation of the Sixth Amendment right to a jury trial where the defendant had a jury and that jury necessarily found an aggravator.

Furthermore, in a case where no automatic aggravators were present, the United States Supreme Court denied review of a Florida capital case with a jury recommendation of death raising a *Ring* claim yet again. *Peterson v. State*, 94 So.3d 514 (Fla. 2012), *cert. denied*, No. 12-6741 (December 10, 2012). In *Peterson*, three

Justices of this Court has dissented as to the sentence based on *Ring*. *Peterson*, 94 So.3d at 540 (Pariente, J., dissenting as to sentence)(expressing similar concerns to those of the federal district court in *Evans* regarding the constitutionality of Florida's death penalty statute in light of *Ring*). *Peterson* involved a "pure" *Ring* claim where neither recidivist aggravator nor the felony murder aggravator was present. *Peterson*, 94 So.3d at 538 (Pariente, J., dissenting as to sentence)(observing that neither automatic aggavator was present). Peterson then filed a petition for writ of certiorari in the United States Supreme Court relying on the dissent in his case and the federal district court's decision in *Evans*. Peterson argued that the United States Supreme Court should review his "pure" *Ring* claim because both this Court and the Eleventh Circuit are not certain how *Ring* applies to Florida and the Court should clarify the matter for both courts. *Evans v. Sec'y, Fla. Dep't. of Corr.*, 699 F.3d at 1262, 1265 (11th Cir. 2012)(stating that while *Ring* did not explicitly overrule *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), "its reasoning arguably conflicts with the *Hildwin* decision" and observing that "a principled argument can be made" that *Hildwin* conflicts with *Ring*). The United States Supreme Court denied the petition regardless of this plea for clarification.

Furthermore, the Eleventh Circuit overruled the federal district court in *Evans v. Sec'y, Florida, Dep't of Corr.*, 699 F.3d 1249 (11th Cir. 2012). The Eleventh Circuit reversed the federal district court's ruling finding Florida's death penalty statute to be a violation of the Sixth Amendment right to a jury trial as

established in *Ring*. The Eleventh Circuit found Florida's death penalty statute to be constitutional. The *Evans* Court described Florida's death penalty procedures as being unlike Arizona's which were at issue in *Ring*, because there is "jury input" in the finding of aggravating circumstances in Florida. *Evans*, 699 F.3d at 1256, 1261 (finding that Florida's "death sentencing procedures do provide jury input about the existence of aggravating circumstances that was lacking in the Arizona procedures . . .").

The *Evans* Court noted that the Supreme Court in *Ring* had described Arizona's capital scheme was one that committed sentencing decision "entirely to judges" and as one where "the trial judge, sitting alone," and where a sentencing judge, "sitting without a jury" found the aggravating circumstance. *Ring*, 536 U.S. at 608, n.6; *Ring*, 536 U.S. at 588; *Ring*, 536 U.S. at 609; *Evans*, 699 F.3d at 1262, n.6. The Eleventh Circuit noted that the Supreme Court itself in *Ring* had characterized states such as Florida as being a "hybrid" sentencing states and placed such states in a third category separate from the judge-only states. *Evans*, 699 F.3d at 1262. The Court observed if the *Ring* Court had intended to rule that jury-only sentencing was required in capital cases, "hybrid systems would not be a separate category." *Id.*

The *Evans* panel noted that for a Florida jury to recommend death, the jury had to find at least one aggravating circumstance. The *Evans* panel noted that in *Jones v. United States*, 526 U.S. 227, 250–51, 119 S.Ct. 1215, 1227–28 (1999), the Court discussed favorably its prior decision in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055 (1989), and "pointed out that Florida juries do play

an important role in the capital sentencing process: In Florida, a jury makes a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Evans*, 699 F.3d at 1261 quoting *Jones*, 526 U.S. at 250-51, 119 S.Ct. at 1228.

The *Evans* Court observed that the "Supreme Court has not decided whether the role that a Florida jury plays in the death-eligibility determination is different enough from the absence of any role, which was involved in *Ring*, for the Florida procedures to be distinguishable" but unless, and until, the Supreme Court did, the Circuit Court was bound by *Hildwin*. *Evans*, 699 F.3d at 1261. The *Evans* panel stated that "nowhere in its *Ring* opinion did the Court say that it was overruling *Hildwin*." *Id.* at 1262. The Eleventh Circuit noted that, while *Hildwin* may conflict with *Ring*, *Hildwin* controlled because it was "directly on point" and therefore, they were bound to follow *Hildwin*. *Id.* at 1264. The *Evans* Court observed that, while the *Ring* Court had overruled *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990), the *Ring* Court had not overruled *Hildwin*. *Id.* at 1264-65. The Eleventh Circuit invoked the United States Supreme Court's repeated instructions regarding such conflicts in the law and observed that the Supreme Court "has told us, over and over again, to follow any of its decisions that directly applies in a case" . . . "and leave to that Court the prerogative of overruling its own decisions." *Id.* at 1263. The panel explained that it was not their place or the district court's to overrule *Hildwin*; it was the Supreme Court's.

The *Evans* Court reviewed the *Ring* claim *de novo* rather than employing the typical AEDPA standards normally applicable to federal habeas cases. *Evans*, 699 F.3d at 1265, n.9 (stating: "[o]ur *de novo* decision on the merits of the *Hildwin/Ring* issue makes it unnecessary for us to decide a number of other issues relating to this claim). The Eleventh Circuit, conducting a *de novo* review, held that Florida's death penalty statute did not violate *Ring*.

Both this Court and the Eleventh Circuit have recognized that it is the United States Supreme Court's place to overrule their prior precedent of *Hildwin*. *See Bottoson v. Moore*, 833 So.2d 693, 695 (Fla. 2002)(quoting the United States Supreme Court's admonition that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, court should follow the case which directly controls, leaving to the Supreme Court "the prerogative of overruling its own decisions" in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)); *King v. Moore*, 831 So.2d 143, 144-45 (Fla. 2002)(same). And the United States Supreme Court has repeatedly declined to overrule that precedent even in "pure" *Ring* cases that are in the pipeline that involve death recommendations such as *Peterson*.

Moreover, if *Ring* applied and required that the jury find one aggravator, then *Ring* was satisfied in the guilt phase in this particular case. One of the aggravators found by the trial court was the "during the course of a felony" aggravator. The jury found Sparre guilty of armed burglary in the guilt phase by special verdict. Basically, the jury unanimously found this aggravator in

the guilt phase by convicting him of felony murder with burglary with a weapon as the underlying felony. *Ring* was satisfied before the penalty phase even began. As this Court recently reiterated, "*Ring* is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony." *Baker v. State*, 71 So.3d 802, 824 (Fla. 2011)(citing *McGirth v. State*, 48 So.3d 777, 795 (Fla. 2010)(citing *Robinson v. State*, 865 So.2d 1259 (Fla. 2004)). Accordingly, *Ring* is not violated in a case where the jury unanimously finds an aggravator in the guilt phase by convicting a defendant of felony murder in the guilt phase. This Court should not recede from *Bottoson* or *King.*

Harmless error

Furthermore, if even there had been a violation of the Sixth Amendment right to a jury trial, violations of the Sixth Amendment right to a jury trial, including *Ring* claims, are subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(finding that error in the judge determining the issue of materiality rather than properly submitting the materiality issue to the jury was harmless error). A rational jury would have found an aggravator if specifically asked to do so. A rational jury would have found the HAC aggravator in a case where the victim was stabbed over eighty times and had 39 defensive wounds. Nor was there any serious dispute regarding the during-the-course-of-a-burglary aggravator. While only constitutionally required to find one aggravator, any jury

would have found both aggravators to be present if asked to do so. Therefore, any error was harmless.

Sufficiency of the evidence

Although not raised as an issue on appeal, this Court has a mandatory obligation to independently review the sufficiency of the evidence in every case in which a sentence of death has been imposed. *See Miller v. State*, 42 So.3d 204, 227 (Fla. 2010); Fla. R.App. P. 9.142(a)(6). In determining the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt. *Id.*

Sparre confessed to law enforcement that he committed this brutal murder. There is no claim that that confession was involuntary or tainted in any manner. A confession is direct and sufficient evidence to support a conviction for first-degree murder. *See Hall v. State*, - So.3d -, -, 2012 WL 3732823, *15 (Fla. August 30, 2012)(finding the evidence to be sufficient to support a conviction for first-degree murder, in a stabbing murder where the victim had defensive wounds, where the defendant confessed to an agent that he "freaked out" and "killed her").

Additionally, Sparre told his ex-girlfriend and mother of his child, Ashley Chewning, that he had murdered a black woman in her apartment in Jacksonville. (T. Vol. 10 996). Sparre told her this about one week after the murder in July of 2010. (T. Vol. 10 995). Chewning saw Sparre with a PlayStation and Sparre told her that he stole it from the woman he killed. (T. Vol. 10 997). The evidence also includes a letter that the defendant wrote to Ashley Chewning, after the murder, on September 16, 2011. (T. Vol. 10 997). Sparre

wrote that he "slumped that bitch" meaning he murdered the victim. (T. Vol. 10 997). That letter is also direct evidence.

Sparre was also captured on video of the hospital where his grandmother was having an operation with the victim. The video from St. Vincent's hospital shows Sparre and the victim, Tiara Pool, leaving the hospital together at 3:20 p.m. on July 8, 2010.

Moreover, the State's DNA expert, Jason Hitt of FDLE, performed STR DNA testing on the knife that was the murder weapon. (T. Vol. 9 769, 771, 781). The DNA on the knife was a mixture of a man's DNA and a woman's DNA. (T. Vol. 9 781-782). Sparre and the victim, Tiara Pool, were possible contributors to that mixture. (T. Vol. 9 782). Only 1% of the population were possible contributors to that mixture and Sparre was in that 1%. (T. Vol. 9 782). Joshua Reid was excluded as a possible contributor. (T. Vol. 9 783-784). This evidence is sufficient to sustain a conviction for first-degree murder.

Proportionality

Although not raised as an issue on appeal, this Court reviews the proportionality of the death sentence in every capital case. *Barnes v. State*, 29 So.3d 1010, 1028 (Fla. 2010)(noting that "this Court reviews the death sentence for proportionality regardless of whether the issue is raised on appeal"). In deciding whether death is a proportionate penalty, this Court considers all the circumstances of the case and compares the case with other capital cases. *Pham v. State*, 70 So.3d 485, 500 (Fla. 2011). The

circumstances in this case include a letter that the defendant wrote, after the murder, to his ex-girlfriend and mother of his child, Ashley Chewning, in which he admitted to murdering the victim merely to "see how it felt." Sparre wrote that he "did it for the rush" and that because he had never stabbed somebody, he thought "it would be a good rush." In the letter, Sparre admitted planning the murder for over a week. This was a senseless, brutal murder in which the victim was stabbed over eighty times and had over 30 defensive wounds.

The death sentence in this case is proportional. The trial court found two aggravating circumstances: 1) HAC and 2) that the murder was committed during the course of a burglary, both of which the trial court gave great weight (R. Vol. 4 700-703). The sole statutory mitigator, the defendant's age of 19 years old, was given moderate weight. (R. Vol. 4 705-706). The trial court explained its weighing decision regarding the age mitigating circumstance, noting that to be significantly mitigating, age must be "linked with some other characteristic" such as immaturity but the trial court found "no evidence of significant emotional immaturity." (R. Vol. 4 705-706). The trial court noted that Sparre "had received his GED; had served in the Army National Guard for a year; and was a father." (R. Vol. 4 706). The trial court also found thirteen non-statutory mitigating circumstances which it gave "little;" "some;" or "slight" weight. (R. Vol. 4 706-711).

This court has found the death sentence proportionate in similar factual cases with similar aggravating and mitigating circumstances. In *Geralds v. State*, 674 So.2d 96, 104-105 (Fla.

1996), this Court found the death sentence to be proportional after a resentencing. Gerald beat and stabbed the victim three times during a burglary of her house in which he stole jewelry and a pair of sunglasses. *Geralds v. State*, 601 So.2d 1157, 1158 (Fla. 1992). The trial court found two aggravators: 1) HAC and 2) the murder was committed in course of robbery or burglary. *Geralds*, 674 So.2d at 104. Geralds was twenty-two years old. The trial court found the statutory mitigating circumstance of age but afforded it little weight. The trial court also found three nonstatutory mitigators but afforded all three "very little weight." This Court concluded that the "lack of substantial mitigation in this case compared to the substantial aggravation" made the sentences proportionate. *Geralds*, 674 So.2d at 105; *see also Merck v. State*, 975 So.2d 1054, 1059, 1066-67 (Fla. 2007)(affirming a death sentence as proportional, in a stabbing death, where the trial court found two aggravating circumstances of prior violent and HAC, where the defendant was 19 years old, which was found as a statutory mitigating circumstance and afforded "some weight" and three non-statutory mitigating circumstances were afforded some weight).

Here, as in *Geralds*, the death sentence is proportionate. In both cases, the victims were murdered during a burglary of their home. And in both cases, the victim was stabbed to death. While the victim was also beaten in *Geralds*, here the victim was stabbed 88 times rather than three times, as in *Geralds*. Here, as in *Geralds*, two aggravating circumstances were found including HAC. Here, those two aggravating circumstances were accorded great weight. While the trial court gave the age mitigating circumstance

moderate weight in this case; the trial court did not give it significant or great weight. The trial court found that there was "no evidence of significant emotional immaturity." (R. Vol. 4 706). The death sentence is proportional.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the conviction and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by email to Assistant Public Defender Nada Carey at nada.carey@flpd2.com this 29th day of March, 2013.

_____
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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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