IN THE SUPREME COURT OF FLORIDA

DAVID KELSEY SPARRE,

Appellant,

v.

CASE NO. SC12-891
L.T. Case NO. 10-CF-8424

STATE OF FLORIDA,

Appellee.

_____/

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

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATUTES PAGE(S)

CONSTITUTIONAL PROVISIONS PAGE(S)

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STATEMENT OF THE CASE[1]

On March 25, 2010, the Duval County Grand Jury indicted appellant, David Kelsey Sparre, for first-degree murder in the death of Tiara Pool. R1:20-22.

Sparre was tried by jury before Duval County Circuit Judge Elizabeth Senterfitt on November 28-December 2, 2011. The jury found Sparre guilty of premeditated and felony (burglary) murder and that Sparre carried, displayed, used, or attempted to use a weapon. R3:592-93, 12:1204.

At the penalty phase on December 13, 2011, Sparre waived the presentation of mitigation evidence. The jury recommended

[1]The first five volumes of the seventeen-volume record on appeal, comprising the pleadings and motion hearings, are designated by the letter "R," followed by the volume number and page number. The next eight volumes, comprising the guilt and penalty phase transcripts, are designated by the letter "T," followed by the volume number and page number. The two volumes of Exhibits are designated by the letter "E," followed by the volume number and page number.

the death penalty by a vote of 12 to 0. T15:1410.

At the Spencer hearing on January 27, 2012, Sparre again waived the presentation of mitigating evidence.

On March 30, 2012, the court sentenced Sparre to death, finding two aggravators: heinous, atrocious, or cruel (HAC), and felony murder (burglary). The court found one statutory mitigating factor, age, 19, and the following nonstatutory mitigating factors: neglect; emotional deprivation and abuse; physical abuse; lack of good support system; father absent until age 12; good at fixing things; dropped out of high school but obtained GED; participated in ROTC in high school and served in United States military; devoted to grandmother; has a child; loves his family; family loves him. R4:694-713; Appendix A.

STATEMENT OF FACTS

Guilt Phase

In July of 2010, Tiara Pool, 21, lived at the Country Club Lake Apartments in Jacksonville. Pool's husband, Michael Pool, was on deployment and their two young sons were living with their grandmother in Bonifay. R8:548-49, R9:719. On July 12, Nichelle Edwards, a friend of Pool's and the children's nanny, went to the apartment to check on Pool because Pool had not been in classes that week. When there was no answer, Edwards entered with her key. She opened the bedroom door a crack, saw a hand on the floor, and ran outside and called 911. R8:435-44.

Officer Wesley Brown responded to the call and found Pool nude on the floor, deceased and covered in blood. R8:456-69. Crime scene detectives arrived shortly thereafter and found no signs of forced entry. R8:479. Pool's open purse was on a table in the living room, with the wallet open and items hanging out of the purse. Pool's cell phone was sitting on the back of the couch. R9:485-86. In the master bedroom, there was blood around the body, on the carpet, baseboards, door, and wall. R8:496. A blue towel was under the body and a pair of black capris with underwear on the floor nearby. R8:499, 502. There was blood on the bed, along with assorted clothing and a bottle of Oxiclean. The comforter was ripped, with blood in the rip. R8:505-07. There was blood on the bathroom door and blood drops

at the entrance to the bathroom. Blood in the grout on the floor around the tub and toilet suggested that area had been cleaned. A large knife, which matched a knife block in the kitchen, was propped against the tub. The tip was missing and the blade was bowed.[2] R8:511-14, 516.

Missing from the residence were Pool's 2003 Chevy Malibu, her keys, a PlayStation, a wireless router, and a DVD. R8:552-53, R9:719.

Dr. Jesse Giles concluded that Pool died from multiple sharp force injuries. There were about 88 sharp force injuries, the majority to the head and neck. In Giles' opinion, Pool was alive when the injuries were inflicted. R11:1015. There was a large slash under her neck from side to side, which alone would have been fatal. Two of four stab wounds to the back went into the lung and also would have been potentially fatal. R11:1024-25. A wound to the upper right forehead went into the skull, from which Giles recovered the knife tip. R11:1018, 1022. There were numerous cuts and stabs to the arms and hands, including 39 cuts to the hands, 11 or 12 of which represented two slices of the blade. R11:1026-31. The wounds to the lungs and throat occurred at the end of the attack, R11:1033, which took minutes, not seconds. R11:1055.

Police looked through Pool's cell phone and found phone

[2] Some Y-DNA on the knife handle was consistent with Sparre's DNA but was also consistent with the DNA of 1 of every 2,300 people. R9:795.

calls and texts to a number of men, including flirtatious and sexually explicit text messages to and from Sparre between July 6 and July 8, 2010. In the July 8 texts, Pool and Sparre agreed to meet at St. Vincent's hospital in Jacksonville. The last message from Pool to Sparre was at 3:24 p.m., saying she had just passed him (in the hospital). The last texts from Sparre to Pool were at 5:21 p.m., saying, don't bother coming, and 6:15 p.m., saying, guess you're mad at me. R8:563-77.

On July 14, Detectives Bodine and Childers went to Waynesboro, Georgia, where Sparre lived with his grandmother. Bodine and Childers, along with Brantley County Deputy Simpson and GBI agent Dyal, told Sparre they wanted to talk to him about an investigation and asked him to accompany them to the Sheriff's Office. Sparre agreed to go and rode with Simpson and Dyal. He was not under arrest and was free to go. The interview was surreptitiously videotaped. R8:579-85.

In the interview, the detectives showed Sparre a photo of Pool and asked if he knew her. Sparre said he met Pool on Craigslist. She had posted an ad three weeks earlier, saying she wanted to chill. On Thursday, July 8, he went to Jacksonville with his grandmother, who was getting a heart catheter at St. Vincent's hospital. He and Pool began texting, and Pool came to the hospital. They met near the information center and talked and then went to her house, where they had

sex. Pool dropped Sparre off at the hospital, and he hadn't talked to her since. He texted her when he got back to the hospital but she didn't respond. R8:593-600, R9:607-42.

After the detectives ended the interview, they took Sparre home, and he gave them the clothing he said he was wearing that day. R8:585, R9:644-45.

After the July 14 interview, police noticed discrepancies btween Sparre's statement and their investigation. Pool's Craigslist post[3] was on July 1, not three weeks earlier, and Sparre's initial response was on July 5. R9:646-47. Also, Sparre's phone records showed that the two texts Sparre said he had sent Pool from the hospital after she dropped him off were actually sent from across the river before he reached the hospital. R9:650, R9:731-32, 707-16.

Surveillance video from St. Vincent's hospital showed Sparre walking into the lobby at 2:20 p.m., Pool walking in ten minutes later, and the two of them sitting together. Another video showed Sparre returning to the hospital through the parking garage, carrying a large shopping bag and wearing different clothing from the clothing he said he was wearing that

[3] Pool had made numerous postings on Craigslist, sometimes describing herself differently, and had communicated with other men on Craigslist. R9:739-45. In the July 1, 2010, post, she said she was looking for friends who were really chill, nothing sexual, and she got along better with men. R9:747. Michael Pool was aware that his wife had posted an ad on Craigslist before his first deployment in late 2009. As far as he knew, the ad was to meet people. He suspected his wife of having relationships with other men but learned only after her death that she had done so. R8:550-59.

day and had turned over to the police. R9:721-28.

Pool's car was found legally parked a block from St. Vincent's hospital, with her house and car keys inside. The driver's seat was positioned to accommodate someone around Sparre's height of 6'3", not the 5'3" Pool. R8: 533-43; R9:719-20; R9:749-54.

On July 24, Detectives Childers and Bodine went to Charleston, South Carolina, to arrest Sparre on a warrant. After being advised of his rights, Sparre consented to a search of his residence, property, and vehicles. R10:816-18.

In the July 24 videotaped interview, Sparre told several different stories about what happened on July 8 and eventually admitted he killed Pool. He initially told police the same thing he had told them on July 14, that Pool came to the hospital, they talked, she drove them to her house, they had sex, and she took him back to the hospital. R10:843-48. He went to his car in the hospital garage before returning to his grandmother's hospital room to deposit a bag with a gift Pool had given him. R10:858. He sent Pool texts when he got back to the hospital but she didn't answer so he figured she was mad at him. R10:879. After the detectives told Sparre the phone records, video, and lab records were going to "hang you out to dry," Sparre said he went to get cigarettes from Pool's apartment and when he returned, there was blood everywhere, and

he freaked out and left. R10:913. When the police did not buy this story, Sparre said he was in the shower and Pool tried to stab him. He freaked out, blacked out, and before he knew what would happen, it was already done. He thought no one would believe it was self-defense, so he wiped everything down. R10:918. He took the PlayStation to a pawn shop in Waynesville. R10:923. Sparre said his stepdad "beat the fuck out me every day for a year-and-a-half and that his mom "beat the fuck out of me" but his grandma "doesn't touch me." R10:933-35. When the detectives told Sparre that Pool was attacked on the bed, not in the bathroom, R10:941, and that it wasn't self-defense, R10:945, Sparre said he didn't know why he did it, that he got a really bad headache and he didn't remember anything from the time he got out of the shower until he got to the car. He then said he got out of the shower and grabbed a blue towel out of the closet. He went to get something to drink, and she ran at him, angry. R10:945-47. When the detectives told him that it didn't start in the kitchen, Sparre said he didn't know how he got the knife, but he remembered opening the bedroom door. She was lying on the bed on her back, and he was giving her a massage. He didn't remember if he had the knife then and didn't remember the actual stabbing. He knew he stabbed her because when he was done, he freaked out and dropped the knife, and he was "flipping," was "tripping, balling," He denied being high on

drugs, "I was real calm when I walked in there because she had Hydrocodone in her purse. I remember that. That's why I was so calm." He took all of them, eight. Asked if he took the pills afterwards, he said, yes, he was tripping out. He didn't know why he went through her purse or why he took the PlayStation. He grabbed all the Hydrocodone in the purse and wiped everything off, including the car. R10:950-52. Asked about the OxiClean on the bed, he said he didn't clean anything, "why would I clean anything?" R10:953, 958. He burned his clothes in a burn pile in the yard. R10:955. Asked how he learned to clean up crime scenes, he said he watched C.S.I. Asked again why, he said he didn't remember stabbing her. Doing it didn't make him feel good, and he was "freaked out like shit" afterwards. R10:962-63. Asked if he had blacked out before, he said he blacked out once when he was driving, and when he came to, a lady hit him, but it was her fault. R10:964. He had blacked out at other times, too, but didn't pass out, "I'll be one place whenever - whenever I just like - and then I'll be another." R10:965. He didn't know why he did it, everything was going good. Asked if he did it to get a thrill, he said, no. When the detectives told him some people do it for a rush, he said he'd jump off a building if he wanted a rush. It was bothering him, and he knew they would be coming eventually. If he had wanted to run, he would have run when he was in Brantley County where he could

have gotten away with it. R10:970-72. He didn't know why he told the detectives he was in a home for boys when he was younger, as he'd kept that inside for a long time. Asked if he thought going to the home was bad, he said, "It is bad. I mean who wants to -who wants to tell somebody that they - (unintelligible) -oh, my mom didn't give a fuck about me and she let her husband -- she chose her husband over me, over her own flesh and blood." R10:973.

After Sparre confessed, police went to Sparre's residence and recovered blue jean material and some green and white striped cloth from a burn pile. Police also recovered pawn tickets from the Waynesville pawn shop where Sparre had pawned a PlayStation and games on July 14. R10:807-10.

Ashley Chewning, 20, testified she and Sparre had a ten-month relationship in 2009, and seven months into the relationship, she got pregnant. They broke up before their child, Chloe, was born, but attempted to get back together in July 2010. A week after his grandmother's surgery in Jacksonville, Sparre told Chewning that "human blood stinks" and that he had killed a black woman in her apartment and stolen her PlayStation. Chewning didn't believe him. On September 16, 2011, Chewing received a letter from Sparre, in which he said he "slumped that bitch," meaning he killed her. R10:992-98.

Penalty Phase

At the penalty phase proceeding before the jury, defense counsel, Rafik Eler, told the trial court that Sparre did not wish to present any mitigating evidence. Mr. Eler informed the court that he had numerous witnesses present and ready to testify to significant mitigation. Dr. Harry Krop would testify to both statutory mental mitigators, that Sparre was under the influence of extreme emotional disturbance and his capacity to conform his conduct to the law was substantially impaired at the time of the crime. Dr. Krop also would testify to five separate psychiatric diagnoses, stemming from early childhood and a dysfunctional family: ADHD, posttraumatic stress disorder, a neurological assessment of substance abuse, intermittent explosive disorder, and bipolar schizoaffective disorder. R15:1235-37, 1239. Dr. Buffington, a nationally-renowned pharmacologist, would testify about the effects of hydrocodone, powder cocaine, alcohol and the other drugs Sparre used, including blackouts and memory loss, the interaction of those drugs, and the effects of continued drug use from age 13 to the present on frontal lobe growth. R15:1238. Drs. Alligood and Greenberg would testify (by video) about Sparre's history mental issues, which began as early as age 11, 12, 13, when he was in the boy's home, Tara Hall, including lack of treatment for PTSD. Alligood and Greenburg would testify based on Sparre's history,

medical records, school records, and consultation with the family. R15:1238-39.

Shannon Bullock, from Belize, a counselor at Tara Hall when Sparre was there, would testify about Sparre's dysfunctional family, the lack of interest by his mother, who dropped him off at Tara Hall to move on with her life and her many husbands, his belief in God, and that he got along well among diverse staff and residents. R15:1239-40. James Dumm, director of Tara Hall Boy's Home, would testify that while Sparre was there, there was little or no contact with his family, and that he called South Carolina's child abuse agency to report abuse because there was no communication at all with the mother. R15:1245-46.

A number of family members also were prepared to testify. Nissa Sparre, Sparre's sister, would describe their horrific upbringing, including the physical and emotional abuse she witnessed and the impact it had on her and her brother. Mary Kay Tyson, Sparre's maternal aunt (his mother's sister-in-law) also witnessed much of the abuse and would testify about, in her words, the "awful, awful life" these kids had. Gladys Sparre and Fred Sparre, who raised Sparre during certain time periods, would testify to the dysfunction on both his mother and his father's side. They would provide the link to Sparre's father, Erik, and would testify to his absence in Sparre's life, that he would not testify because he has a misdemeanor warrant in

Florida, and that both parents put their own wants ahead of their children. Rhonda Hickox, Sparre's mother, would show the dysfunction of Sparre's upbringing and would testify that she's been married seven times, has moved numerous times, that several of her husbands were physically, emotionally, and mentally abusive to Sparre, and that each marriage came first, not her son, ultimately culminating in her placing him in a home, where he was left for two years. Although the program was designed to reintegrate families and allowed families extensive access to the children, she visited her son one time in the two years he was there. Mary Varnadore, Sparre's maternal grandmother would testify that the two most significant relationships Sparre had were with her and her late husband and that these relationships were routinely hindered by Sparre's mother, who denied them access at times and only allowed for a meaningful relationship when Sparre came to live with her after he was released from the boy's home. Mrs. Varnadore would testify to the lack of relationship Sparre had with his mother and how it affected him, that he couldn't sleep at night and would try to crawl in Mrs. Varnadore's bed and would wake up in the middle of the night screaming and trying to climb the walls. R15:1241-48.

After the proffer, the trial judge asked Sparre if he had discussed the mitigation with his counsel and investigators. Sparre said he had and didn't want them to present the evidence.

Sparre told the judge he had been prescribed Thorazine and Celexa after telling the mental health counselor at the jail that he was having trouble sleeping but had stopped taking it because it gave him the shakes. The trial judge found that Sparre knowingly and voluntarily waived presentation of mitigation. R15:1248-59.

Three witnesses testified to the impact on the community of Pool's death: Michael Pool, Pool's husband; Thelma Summers, Pool's grandmother by marriage; and Valerie Speed, Pool's aunt. R15:1275-86.

After instructions and closing argument, the jury returned a recommendation of death by a vote of 12 to 0. R15:1410.

A Spencer hearing was held on January 27. Sparre again waived the presentation of mitigating evidence, and defense counsel notified the court that the mitigation witnesses were again present and ready to testify. The state sought to introduce a letter written by Sparre to Ashley Chewning on January 2, 2012, after the penalty phase, which had been confiscated at the jail. Chewning and a jail sergeant testified respectively that the writing was Sparre's and that Sparre wrote the letter. The trial court later admitted the letter into evidence as additional proof of the aggravating circumstances already argued (HAC and committed during a burglary). R4:671-672. In the letter, Sparre said he wanted "to tell the truth

about why I killed that girl." He wrote that he knew he was going to Jacksonville a week before he started looking for a potential victim and he wanted to try something to see how it felt. He knew the police would come talk to him so "I had the perfect alibi . . . taking my grandma to the doctor." He said it took over five minutes to kill her, that she was on the bed on her stomach when he began, then "we moved on by the bedroom after she quit fighting I tilted her head and sliced her throat." He said he planned it for a week and a half and did it for the rush and enjoyed it. "I never stabbed somebody and so I just thought it would be a good rush so I did it. Anyway the point I'm getting at is that I did what I did because I could and I almost got away with it." E2:286-288.

Sentencing Order

On March 30, the trial court entered its sentencing order. In the order, the judge stated that she had "taken into account all of the evidence presented during the trial, including the guilt and penalty phases, the Spencer hearing, the sentencing memoranda submitted by the parties, as well as the PSI." R4:695. The judge noted she could call witnesses to testify to mitigation evidence if the PSI revealed evidence of significant mitigation. R4:704.

The court found two aggravating circumstances, the murder was committed during a burglary (great weight) and was especially heinous, atrocious, or cruel (great weight).

In mitigation, the court found one statutory mitigating factor, Sparre's age, 19 (moderate weight) and the following nonstatutory mitigators: neglect (some weight); emotional deprivation and emotional abuse (some weight); physical abuse (some weight); lack of good support system (little weight); father absent from life until age 12 (some weight); good at fixing things (slight weight); dropped out of high school but obtained a GED (little weight); participated in ROTC in high school and served in the U.S. military (slight weight); devoted to grandmother (little weight); has a child (some weight); loves his family (some weight); family loves him (some weight). R4:694-713; Appendix A.

The judge explained her mitigation findings as follows. She concluded that the statutory mitigating circumstance of extreme emotional disturbance was negated by the letter Sparre wrote after the penalty phase. The judge noted that although Drs. Greenberg, Alligood, and Krop would have testified that Sparre suffered from PTSD, she was "not required to accept this mitigating circumstance based on this proffer." R4:705 n.5.

The judge rejected the mitigating circumstance of impaired judgment, noting that although Dr. Krop would have testified

that Sparre's "decision-making processes were based on immaturity and impulsiveness," she was "not required to accept this mitigating circumstance as proven based on this proffer." R4:707 n.6.

The judge found the mitigating factor of neglect "based on the limited evidence" before it, i.e., information in the PSI that Sparre was raised intermittently by his mother, grandmother, and sister; his mother was married 7 times and would move when entering into a new relationship; and Sparre was placed in Tara Hall at age 13. The judge noted that the defense was prepared to present the testimony of Sparre's mother, grandmother, and two counselors from Tara Hall with regard to Sparre's neglect and abandonment but stated that she was "not required to accept this mitigating circumstance." R4:708 n.7.

In addressing the mitigating factor of emotional deprivation and abuse, the judge stated,

> The Defendant argues that his dysfunctional family life and lack of parental support caused him to suffer from emotional deprivation. The Defendant also argues he was emotionally abused by his mother and step-fathers. There is limited information before this Court, however, based on the Defendant's unstable home life, one would logically conclude that such an upbringing would lead to emotional issues.

R4:708. The judge noted that while Drs. Krop and Greenberg were prepared to testify to Sparre's emotional deprivation, she was

"not required to accept this mitigating evidence as proven based on this proffer." R4:708 n.8.

With regard to the mitigator of physical abuse, the trial court wrote: "In the PSI, the Defendant reported he was beaten by one of his step-fathers. Additionally, during the Defendant's July 24, 2010, interrogation, he stated both his mother and step-father beat him." R4:709. Noting that Sparre's sister, grandmother, and aunt were prepared to testify to this mitigating circumstance, the court found it proved. R4:709 n.9.

SUMMARY OF ARGUMENT

Issue 1. The trial court erred in not calling on its own four mental health experts and other witnesses whose testimony would provide significant mitigation not otherwise in the record. At the penalty phase, defense counsel informed the trial court that Sparre intended to waive mitigation. Following the procedure outlined in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), defense counsel informed the court that he had numerous witnesses ready to testify, including a forensic psychologist, a pharmacologist, and two other doctors, who would testify to extensive mental mitigation, including that Sparre had five separate mental health diagnoses and qualified for both statutory mental mitigators. Given the trial court's responsibility to ensure that Sparre receive individualized sentencing, the court erred in not calling these witnesses on its own and then rejecting the mitigating circumstances their testimony likely would have proved.

Issue 2. This Court should recede from its decision in Hamblen v. State, 527 So. 2d 800 (Fla. 1988), and require the appointment of special counsel to present mitigating evidence in those cases where the defendant does not contest the death penalty. There are compelling reasons to recede from Hamblen.

First, the foundation upon which Hamblen was erected has long been discarded. In Hamblen, this Court posed the problem

of a death-seeking capital defendant as a conflict between the defendant's right to represent himself versus the public interest in fair and reliable sentencing and concluded that appointment of public counsel would violated the defendant's right to represent himself. Since Hamblen, the Court has recognized that appointment of special counsel does not impermissibly restrict a defendant's Faretta rights but addresses, rather, a separate problem. Thus, while a defendant has a right to waive mitigation, a defendant does not have a right to choose his sentence; that choice must be made according to the laws and constitutions of Florida and the United States.

Second, the case-by-case approach the Court has followed since Hamblen has resulted in arbitrary, unreliable, and non-uniform sentencing at the trial level, which in turn has rendered this Court's constitutionally-required review process suspect. Although trial courts have a duty to consider all possible mitigating evidence, judges have unlimited discretion in how to accomplish this when the defendant waives mitigation. Judges can appoint special counsel to investigate and present mitigating evidence, or not; can call persons with mitigating evidence on their own, or not; and can accept proffered mitigation as proved, or not. The result is that in some cases, the trial court and this Court determine whether death is appropriate based on full consideration of all available

mitigating evidence, while in other cases, significant mitigation is available but never considered by the trial court or this Court. A sentence of death resulting from anything less than a full airing of the relevant facts in mitigation does not meet the constitutional standards of reliability recognized by this Court. Accordingly, this Court should recede from Hamblen and require the appointment of special counsel to present the case for mitigation in all cases where the defendant foregoes the presentation of mitigation evidence.

Issue 3. The death penalty was improperly imposed in this case because Florida's death penalty statute is in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

Issue 1

THE COURT ERRED IN NOT CALLING AS ITS OWN WITNESSES FOUR MENTAL HEALTH EXPERTS AND OTHER WITNESSES WHO WERE AVAILABLE TO TESTIFY TO EXTENSIVE MENTAL MITIGATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court has a duty to consider and weigh all possible mitigating evidence in the record, even when the defendant waives mitigation. If the PSI alerts the court to the probability of significant mitigation, the court must call persons with mitigating evidence as its own witnesses or appoint special counsel to present the mitigation evidence. Here, defense counsel's proffer, along with the PSI, alerted the court to the existence significant mitigation, including extensive mental mitigation, not otherwise in the record. Given the trial court's obligation to ensure that Sparre receive individualized sentencing, the court erred in not calling the experts and other persons with mitigating evidence as its own witnesses.

Standard of Review. The standard of review is abuse of discretion. That discretion is limited, however, by the Florida Rules of Criminal Procedure, the Florida and United States Constitutions, and the rules and procedures established this Court has established for those cases in which the defendant waives the presentation of mitigating evidence.

Analysis

While a competent capital defendant has the right to waive presentation of mitigating evidence, see Pettit v. State, 591 So. 2d 618 (Fla.), cert. denied, 506 U.S. 836 (1992); Hamblen v. State, 527 So. 2d 800 (Fla. 1988), this "does not mean that courts can administer the death penalty by default," or that the "rights, responsibilities, and procedures set forth in our constitution and statutes have [] been suspended." Hamblen, 527 So. 2d at 804. Accordingly, "a defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law." Id.

To that end, this Court has imposed additional obligations on trial courts when a defendant refuses to present mitigating evidence. First, where a defendant waives mitigation, there must be an on-the-record inquiry showing the waiver is free, knowing, and voluntary. Specifically,

> [1]counsel must inform the court on the record of the defendant's decision. [2] 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. [3] The trial court should then require the defendant to confirm on the record his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993).

Second, to ensure that death is appropriate, "it is the

responsibility of the trial court to affirmatively show that all possible mitigation has been considered and weighed." See Robinson v. State, 684 So. 2d 175 (Fla. 1996); see also Farr v. State, 621 So. 2d at 1369; Pettit, 591 So. 2d at 620.

Third, the trial court must abide by the procedural safeguards set forth in Mohammad v. State, 782 So. 2d 343 (Fla. 2001). In Mohammad, this Court held the trial court erred in giving the jury's recommendation great weight "in light of Mohammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence." Id. at 361-62. Anticipating that Mohammad might again waive mitigation, the Court "considered what procedures should apply on resentencing." Id. at 363. Acknowledging that it had struggled with how to "ensure the reliability, fairness, and uniformity in the imposition of the death penalty" when a defendant waives mitigation, the Court adopted a rule requiring a PSI in all cases where the defendant waives mitigation:

> 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 should 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. Furthermore, 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. . . . 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) or to utilize standby counsel for this limited purpose.

782 So. 2d at 363-64.

In explaining the basis for this prospective rule, the Court noted that Mohammad's failure to present mitigating evidence had made it "difficult, if not impossible" for the Court to conduct its constitutionally mandated proportionality review, i.e., to compare the aggravators and mitigators in Mohammad's case to those present in other death penalty cases. Although a PSI had been ordered in Mohammad's case, and the PSI indicated that Mohammad had a history of serious psychological problems that was readily available in hospitalization records, no mental mitigating evidence had been presented. Id. at 364-65. The Mohammad safeguards were intended to correct this problem, i.e., to "ensure that the defendant's relevant background information regarding mental health and family history will be considered by the trial court and this Court" and "that the decision as to the appropriate sentence is well informed." Id. at 367 (Harding, J., concurring).

Mohammad and subsequent cases have made clear that the overriding purpose of the Mohammad safeguards is to ensure the constitutionality of the process by which the death penalty is

imposed. Paramount in that process is the requirement of individualized sentencing. The Court recently emphasized this point in Barnes v. State, 29 So. 3d 1010, 1025 (Fla. 2010). Barnes argued on appeal that the trial court's appointment of special counsel over his objection violated his Faretta right to conduct his own defense. The Court rejected this argument, concluding that the appointment of mitigation counsel was proper to ensure that the penalty of death, if imposed, "would be justified and not be imposed in an arbitrary or capricious manner." 29 So. 3d at 1025. The Court explained:

> The Supreme Court in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), reiterated the requirement of individualized sentencing in capital cases that is required by the Eighth and Fourteenth Amendments to the United States Constitution. See id. at 105, 102 S.Ct. at 869. "The use of mitigation is a product of the requirement of individualized sentencing." Kansas v. Marsh, 548 U.S. 163, 174, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006). Thus, in order for a trial court to carry out its duty to give each capital defendant the individualized sentencing that the Constitution requires, the court may appropriately require presentation of mitigation where a pro se defendant such as Barnes essentially refuses to present any evidence of mitigation. Presentation of mitigation in such a case also allows this Court to carry out its obligation to determine if the death sentence is proportionate.

Id. The Court noted that Faretta and later cases make clear that "'the right of self-representation is not absolute'" and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's

interest in acting as his own lawyer.'" Id. at 1026 (quoting Indiana v. Edwards, 554 U.S. 164 (2008)). The court concluded therefore that "[b]ecause the trial court and this Court each has a constitutional obligation to ensure that Barnes received individualized sentencing and that the death penalty is fairly and constitutionally imposed, Barnes' right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case." Id. at 1026.

In the present case, Mr. Eler informed the court that four clinical experts were prepared to testify about Sparre's mental problems. Dr. Krop would testify to five separate psychiatric diagnoses, stemming from Sparre's early childhood and dysfunctional family: ADHD, posttraumatic stress disorder, substance abuse, intermittent explosive disorder, and bipolar schizoaffective disorder. Dr. Krop also would testify that Sparre was under the influence of extreme emotional disturbance and that his capacity to control his behavior or conform his conduct to the law was substantially impaired when he killed Ms. Pool. Dr. Buffington, a pharmacologist, would testify about the effects of Sparre's drug use from age 13 to the present, including blackouts and memory loss and the effect of his drug use on frontal lobe growth. Drs. Alligood and Greenberg would testify about Sparre's history of mental issues dating back to

when he was at Tara Hall, at ages 11, 12, 13. Their testimony was based on medical records, school records, and consultation with the family. In addition, members of Sparre's family and staff members at Tara Hall, including the director, were available to testify to physical and emotional abuse they personally witnessed and how that abuse affected Sparre.

The proffered mental mitigation clearly eclipsed that provided in the PSI, whose only reference to mental health was that Sparre's grandmother, Mrs. Varnadore, reported he was "mentally challenged and had mental problems," in addition to suffering from ADHD.

Severe mental disturbance is a mitigating factor "of the most weighty order." Rose v. State, 675 So. 2d 567 (Fla. 1996); see also Santos v. State, 654 So. 2d 838, 840 (Fla. 1994)(extreme emotional disturbance and substantially impaired capacity are "two of the weightiest mitigating factors"). As the Eleventh Circuit has said, "Psychiatric mitigating evidence 'has the potential to totally change the evidentiary picture.'" Baxter v. State, 45 F.3d 1501, 1515 (11th Cir.)(quoting Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988)), cert. denied, 516 U.S. 946 (1995). Accordingly, courts have held in numerous cases that the failure to present such evidence constituted prejudicial ineffectiveness. See, e.g., Hildwin v. State, 654 So. 2d 107, 110 (Fla. 1995)(prejudice established by

expert testimony that statutory mental mitigators applied, history of substance abuse, childhood abuse and neglect); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" including schizoid personality and both statutory mental mitigators), cert. denied, 509 U.S. 908 (1993); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, child abuse, and drug and alchohol abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood).

The presence of mental mitigation also has been critical in this Court's proportionality review and can be the basis for reducing a death sentence to life without parole. See, e.g., Robertson v. State, 699 So. 2d 1343 (Fla. 1997); Besaraba v. State, 656 So. 2d 1 (Fla. 1995); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Rivera v. State, 561 So. 2d 536 (Fla. 1990); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Klokoc v. State, 589 So. 2d 219, 222 (Fla. 1991); DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995).

Here, the proffer, along with the PSI, alerted the trial judge to substantial mental mitigation not otherwise in the record, including that Sparre's mental health significantly

contributed to the murder. The persons who could testify to this mitigating evidence were ready to testify at both the penalty phase hearing and at the Spencer hearing. Under the circumstances, it was error for the trial judge not to call these witnesses and then reject the mitigating circumstances their testimony likely would have established. Because the judge declined to hear the proffered witnesses, the judge considered only the mitigating factors for which the guilt phase or PSI provided evidence.[4]

The judge rejected extreme emotional disturbance, reasoning that this mitigator was negated by Sparre's letter to his ex-girlfriend. While Sparre's letter could be a sufficient basis to reject the mitigating factor of emotional disturbance, it was error for the trial court to rely on the letter without considering the expert testimony in support of the mitigator. Under the circumstances, the trial court abused its discretion in not calling Dr. Krop to testify.

The trial court also erred in not considering and weighing Sparre's history of alcohol and drug abuse, which this Court has considered a nonstatutory mitigating circumstance. See e.g.,

[4] Prior to Sparre's waiver, defense counsel submitted a list of 49 separate mitigating circumstances. R4:645. After the trial judge accepted Sparre's waiver of the presentation of mitigating evidence, this list was pared down to 12 mitigating factors for which the guilt phase (specifically Sparre's July 24 interview) or PSI provided some evidence. The defense also dropped a few mitigators based on the state's assertion of rebuttal evidence. R15:1304-26.

Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996); Beseraba v. State, 656 So. 2d 441 (Fla. 1995); Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994); Heiney v. Dugger, 558 So. 2d 398, 400 (Fla. 1990). The PSI stated:

> The defendant admits to both heavy drinking and extensive drug use since an early age. The defendants states he has been using pills since age 14. He stated he had illegally used Xanax, Ecstasy, Hydrocodone, and Percocet pills. He stated his drug of choice is alcohol. He admits that he preferred vodka, and was a blackout type drinker, on average blacking out two times per month. He state he was normally non-violent and laid back under the influence of alcohol. He stated he did not prefer bourbon, because he did not like the effect as it was opposite of feeling laid back. He admitted he blacked out on his 18th birthday when drinking and partying with his mother.

In addition to the PSI, defense counsel proffered that Dr. Buffington, a renowned pharmacologist, would testify about the effects of Sparre's long-term drug and alcohol use, including the effects of his drug use since age 13 on the development of his frontal lobe. The PSI should have prompted the trial court to call Dr. Buffington as its own witness to give an expert opinion on the effect of Sparre's lengthy history of drug and alcohol abuse. The trial court erred in failing to consider Sparre's substantial history of drug and alcohol abuse in mitigation.

Although the procedure giving trial courts discretion to call witnesses on their own to determine whether mitigating

circumstances apply was announced in the context of information in a PSI, the same rule should apply to information in a proffer. The underlying purpose of the Mohammad rule is to ensure that all capital defendants receive the individualized sentencing required by the Constitution. Given that purpose, logic and reason dictate that trial courts be required to call any witness who is likely to provide significant mitigating evidence, whether the evidence is indicated in the PSI, other records, or defense counsel's proffer. In determining whether to call persons with mitigation evidence as court witnesses, trail courts are guided by the constitutional and statutory framework set forth in Hamblen and its progeny. See Sekot Laboratories, Inc. v. Gleason, 585 So. 2d 286 (Fla. 3d DCA 1990)("exercise of discretion must be measured against articulable standards in order to arrive at a principled reason for decision"). Thus, when a trial court is alerted to the probability of significant mitigation not otherwise in the record, the trial court must either call the persons with mitigating evidence on its own or appoint special counsel to present the evidence. This rule is consistent with the Court's decision in Ocha v. State, 826 So. 2d 956, 962 (Fla. 2002), where this Court held the trial court did not err by not ordering tests mentioned by the experts because the record contained ample evidence from which "the trial court could

determine the extent to which Ocha's mental condition impacted his life."

Unlike Ocha, there was no evidence already in the record directed to Sparre's mental condition or the extent to which it impacted his life or contributed to the crime. Under these circumstances, the trial court abused its discretion in not calling the persons with mental mitigating evidence as its own witnesses. The trial judge also abused its discretion in not calling all the witnesses available and ready to testify to significant mitigating evidence, including the abuse Sparre suffered at the hands of his mother and several step-fathers.

Determining whether death is an appropriate penalty by considering and weighing aggravating and mitigating circumstances is not a quantitative process. It is a qualitative process, and the facts supporting each mitigating circumstance are essential to the determination of whether a mitigating circumstance has been proved and how much weight it should be given.

Here, Mr. Eler alerted the trial court to the probability of significant mitigation, including that Sparre qualified for the two statutory mental mitigating factors. The trial court thus should have called those persons with mitigation evidence to testify. The trial judge's failure to do so, when the record was otherwise devoid of mental mitigating evidence, was error,

and this Court should reverse and remand for a new sentencing proceeding.

Issue 2

THIS COURT SHOULD RECEDE FROM HAMBLEN V. STATE, 527 So. 2d 800 (FLA. 1988), AND REQUIRE THE APPOINTMENT OF INDEPENDENT PUBLIC COUNSEL TO PRESENT WHATEVER MITIGATION REASONABLY CAN BE DISCOVERED IN ALL CASES WHERE THE DEFENDANT SEEKS THE DEATH PENALTY OR WAIVES THE PRESENTATION OF MITIGATING EVIDENCE.

This Court has long grappled with the problem of capital defendants who refuse to mount a defense to the death penalty, i.e., how to ensure that death be imposed reliably and proportionately when a defendant asserts his right to waive the presentation of mitigating evidence. The Court has attempted to solve the problem by requiring trial courts to order comprehensive PSIs in all cases and permitting courts to call persons with mitigating evidence as court witnesses or appoint special counsel to present mitigating evidence when the defendant refuses to do so. Despite these additional safeguards, the lack of a uniform procedure has resulted in unequal sentencing, a less-than-full airing of the relevant facts in many cases, and an inadequate record for this Court to review to determine if death is a proportionate penalty. To achieve the fairness, reliability, and uniformity the required by the constitution, a true adversarial proceeding at both trial and appellate levels is necessary. Accordingly, appellant asks this Court to recede from Hamblen and require appointment of

special counsel to present mitigation in all cases where the defendant waives the presentation of mitigating evidence.

Current Law: A Case-by-Case Approach

This Court first addressed this issue in Hamblen v. State, 527 So. 2d 800 (Fla. 1988). In Hamblen, the defendant waived counsel and pled guilty to first-degree murder. He also waived a penalty phase jury, presented no mitigation, and challenged none of the aggravating evidence. On appeal, his counsel argued the trial court should have appointed special counsel to present and argue mitigation to protect society's interests in ensuring that the death penalty be imposed properly. The Court rejected this argument:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have the right to control their own destinies.

Id. at 804.

The Court also held that a defendant's right to represent himself "does not mean that courts of this state can administer the death penalty by default" or that the "rights, responsibilities and procedures set forth in our constitution and statutes have [] been suspended because the accused invites

the possibility of a death sentence." The Court found that the trial judge who sentenced Hamblen had protected society's interest in ensuring that the death sentence was not improperly imposed by carefully analyzing the propriety of the aggravating factors and the possible statutory and nonstatutory mitigating evidence. Id. The trial court had considered the reports of two doctors who had examined Hamblen for competency and sanity, as well as information related to his family background, work history, and absence of criminal history. The Court concluded:

> We hold there was no error in not appointing counsel against Hamblen's wishes to seek out and present mitigating evidence and to argue against the death penalty. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

Id. at 804.

Later, in Petit v. State, 591 So. 2d 618 (Fla. 1992), the Court adhered to the rule announced in Hamblen and affirmed the trial court's decision to allow the defendant to waive mitigation. The Court reiterated the responsibility of the trial court to analyze the possible statutory and nonstatutory mitigating factors. In sentencing Petit, the trial judge had taken judicial notice of the reports and testimony of mental health experts who had testified at a prior competency hearing and had received a PSI. Also, at the state's request, the judge had appointed two neurologists to examine Petit to determine if

there were any physical or mental mitigators. The neurologists testified that Petit's Huntington's chorea did not contribute to the crime and the mental mitigating circumstances did not apply. The judge also heard the testimony of Petit's grandfather[5] regarding the effects of the disease on a person. On this record, the Court concluded the judge had performed its duty of carefully analyzing all possible mitigators.

In Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), the Court held that trial courts are obligated to ensure that that a defendant's waiver of mitigation is knowing, uncoerced, and not due to counsel's failure to investigate. Before accepting a defendant's waiver, therefore, counsel must inform the court on the record what mitigating evidence has been uncovered, and the defendant must confirm on the record that counsel has discussed those matters with him. Thus, regardless of the defendant's wishes, defense counsel still has a duty to investigate and develop mitigation. See, e.g., State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002)("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).

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5 Petit's father and grandmother had Huntington's chorea, and his father had committed suicide.

In Klokoc, 589 So. 2d 219 (Fla. 1991), the Court impliedly recognized that appointment of special counsel to bring forth mitigating factors does not conflict with the defendant's right to self-representation under Faretta. When Klokoc refused to allow his lawyer to present mitigation, the trial court appointed special counsel to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." Id. at 220. Special counsel presented evidence that Klokoc was under extreme emotional distress when the murder occurred, suffered from bipolar affective disorder, and that his family had a history of suicide, emotional disturbance, and alcoholism. On appeal, following Klokoc's wishes, appellate counsel sought leave to withdraw and dismiss the appeal. The Court denied the request:

> [C]ounsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence.
>
> Accordingly, counsel for appellant is directed to proceed to prosecute this appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.

Id. at 221-22.

The Court also unanimously reduced Klokoc's death sentence to life on the grounds that the mitigating evidence presented by special counsel rendered death disproportionate. Id. at 222.

In Farr v. State, 621 So. 2d 1368 (Fla. 1993)(Farr I), the defendant waived a jury recommendation and did not present any mitigating evidence. At sentencing, the PSI and psychiatric reports contained information regarding Farr's troubled childhood, numerous suicide attempts, the murder of his mother, psychological disorders resulting in hospitalization, sexual abuse, and chronic alcohol and drug abuse. The Court reversed because the trial court failed to consider this mitigation:

> Farr argues that the trial court was required to consider any evidence of mitigation in the record, including the psychiatric evaluation and presentence investigation. Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. 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.

Id. at 1369 (emphasis in original, internal citations omitted).

On resentencing, Farr again forbade his attorney from presenting a case for mitigation and himself took the stand and "systematically refuted, belied, or disclaimed virtually the entire case for mitigation." Farr v. State, 656 So. 2d 448 (Fla. 1995)(Farr II). The Court found no error in the trial court's rejection of the mitigation and adhered to its previous holding 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. Id. at 450. Acknowledging this as "a troubling area of the law," the Court encouraged trial judges to order PSIs when the defendant does not challenge death. Id.

In Mohammad v. State, 782 So. 2d 343 (Fla. 2001), the Court concluded that trial judges must order a comprehensive PSI in all capital cases. The Court noted that judges have discretion to call witnesses on their own to determine whether mitigating circumstances apply or appoint special counsel to assist in discovering and presenting mitigation, as was done in Klokoc. In adopting these extra steps, the Court noted that it was required to perform a proportionality review of every death sentence by comparing the totality of the circumstances in each case with other capital cases but that Mohammad's failure to present any mitigation had made it "difficult, if not impossible" for the Court to adequately compare the aggravating and mitigating circumstances in his case to those present in other death penalty cases. Although Mohammad's PSI indicated a history of serious psychological problems, information readily available from hospitalization records, no evidence of mental mitigation was presented. The Mohammad procedures thus were adopted to provide a means of ensuring that a defendant's relevant family background and mental health history would be considered by the trial court and this Court.

Most recently, in Barnes v. State, 29 So. 3d 1010 (Fla. 2012), the Court rejected Barnes' argument that appointment of special counsel to investigate and present mitigation violated his Faretta right to self-representation. The Court noted that the death penalty "'is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.'" 29 So. 2d at 1025 (quoting Spaziano v. Florida, 468 U.S. 447, 468 (1984)(Stevens, J., concurring in part and dissenting in part)). The Court further noted that individualized sentencing is required in all capital cases by the Eighth and Fourteenth Amendments and that "'mitigation evidence is a product of the individualized sentencing requirement.'" Id. (quoting Kansas v. Marsh , 549 U.S. 163 (2006)). The Court also pointed out that the right of self-representation is not absolute and, at times, is outweighed by the government's interest in ensuring the integrity and efficiency of the trial. Id. 1025-26. The Court thus held:

> [I]n order for a trial court to carry out its duty to give each capital defendant the individualized sentencing that the Constitution requires, the court may appropriately require presentation of mitigation where a pro se defendant such as Barnes essentially refuses to present any evidence of mitigation. Presentation of mitigation in such a case also allows this Court to carry out its obligation to determine if the death sentence is proportionate.
>
> . . . .

> Because the trial court and this Court each has a constitutional obligation to ensure that Barnes received individualized sentencing and that the death penalty is fairly and constitutionally imposed, Barnes' right to self-representation was not violated by the appointment of independent counsel under the facts and circumstances present in this case. Mitigation counsel was appointed, not to supplant Barnes as his own counsel, but to assist the court by presenting mitigation evidence where Barnes refused to do so.

Id. at 1025-26.

Last, in several cases, the Court has held that where a defendant waives mitigation, the trial court is not required to accept potential mitigating circumstances as proven based on defense counsel's proffer, see LaMarca v. State, 785 So. 2d 1209 (Fla. 2001)("[p]roffered evidence is merely a representation of what evidence the defendant proposes to present and is not actual evidence"), nor is the trial court required to call on its own persons defense counsel has proffered could establish mitigating circumstances. See Grim v. State, 841 So. 2d 455 (Fla. 2003)(where defendant waived mitigation and defense counsel proffered that Dr. Larson's testimony could establish statutory mental mitigators, trial court not required to call Larson as court witness).

To summarize current law, the trial court is responsible for ensuring that a death sentence is imposed reliably when a defendant does not contest death. To that end, trial courts

must order PSIs and must consider any possible mitigation already in the record. The trial court may, if it chooses, call persons with mitigation evidence as court witnesses or appoint special counsel to present the case for mitigation but is not required to do so. The trial court may, if it chooses, consider defense counsel's proffered mitigation as proven but is not required to do so.

The Alternative View

Over the years since Hamblen was decided, six justices of this Court have reached the conclusion that society's need for reliable and proportionate sentencing is best achieved by appointment of special counsel to present the case for mitigation. In Hamblen itself, Justices Barkett and Ehrlich dissented. Justice Barkett wrote that despite the majority's focus, the issue was not the defendant's right to represent himself, as Hamblen's appellate counsel conceded Hamblen's right to represent himself, but rather how to meet the state's independent obligation to present a case for mitigation when the defendant chooses not to do so. Justice Barkett noted that death must "'serve both goals of measured, consistent application and fairness to the accused,'" and must "'be imposed fairly, and with reasonable consistency, or *not at all.*'" 527 So. 2d at 808 (quoting Eddings v. Oklahoma, 455 U.S. 104, 111 (1982)). This heightened scrutiny is thwarted when the

defendant waives "*any* part of the proceedings critical to determining the proper sentence." 527 So. 2d at 808. Justice Barkett concluded that appointment of public counsel accommodates society's need for a reliable and proportionate sentence without infringing on the defendant's right to self-representation. "Reliability in imposing the death penalty . . . can be achieved only in the context of a true adversarial hearing." Id. at 809.

Justice Ehrlich concurred, emphasizing the statutory requirement that all death sentences be automatically reviewed by the Florida Supreme Court:

> So long as this Court has this legislatively mandated responsibility, we must have a meaningful record to review to determine if death be the appropriate penalty. . . As I view it, we cannot perform our review function without an adequate record of facts which may tell whether death is the appropriate penalty.

Id. at 806.

Subsequently, in Farr II, Justice Kogan, joined by Justice Anstead, concluded that the case-by-case framework the Court had developed could result in the unequal imposition of death penalties. Justice Kogan was troubled that Klokoc's death penalty was reduced to life because the trial court appointed special counsel, whereas, in Farr's case, because no special counsel was appointed, neither the trial court nor the Florida Supreme Court heard any possible mitigation: "For all we know,

Farr's true case for mitigation may be more compelling than that of Klokoc." Id. at 451.

Two years later, Justice Anstead, joined by Justices Shaw and Kogan, concluded the current procedure allowed death by default and "this Court obviously cannot carry out its mandatory obligation to conduct a reasoned proportionality analysis of the penalty on appeal where there has been a default in the trial court." Hauser v. State, 701 So. 2d 329 (Fla. 1997),[6]

In 2001, in Mohammad, Justice Pariente wrote that she, too, would require appointment of special counsel to present mitigation "to assist the trial court and this Court in fulfilling its constitutional and statutory obligations in death penalty cases." 782 So. 2d at 368 (Pariente, J., specially concurring). In Ocha v. State, 826 So. 2d 956 (Fla. 2002)(Pariente, J., concurring in result only as to sentence), Justice Pariente called again for appointment of special counsel to present mitigation where the defendant does not. Justice Pariente pointed out that Ocha's counsel indicated that Ocha had

[6] In Hauser, the defendant pled nolo and instructed his counsel not to present mitigation. At sentencing, counsel made an oral proffer of potential mitigation that "could have been investigated." The judge accepted the proffered mitigation as proven, finding one statutory and four nonstatutory mitigators, including under the influence of drugs or alcohol and emotional or mental health problems since age 14. On appeal, the Court found no error in the judge's failure to acknowledge each possible mitigator in the PSI, reasoning that the judge gave "good faith consideration to the mitigation contained in the record" by accepting the proffered mitigation as proven, and although the judge did not mention the PSI, much of the data in the PSI was cumulative to information the court addressed in its order.

a history of attempted suicide, two prior severe head injuries, a history of drug and alcohol abuse, and might be mentally ill, this evidence was not developed in the record, hindering the Court's ability to determine whether death was a proportionate sentence in his case).

Problems With the Case-by-Case Approach

Hamblen and its progeny are based on two premises, one, that appointment of special counsel would violate a defendant's right to self-determination, and two, that a case-by-case approach would ensure that the death penalty is imposed fairly, reliably, and uniformly. Since Hamblen, the first premise has been rejected and the second has proved unsound.

As to the first premise, as discussed above, the Court explicitly has recognized that appointment of special counsel does not impermissibly restrict a defendant's Faretta rights[7] but addresses, rather, a separate problem. See Klokoc; Mohammad; Barnes. Thus, while a defendant has a right to waive mitigation, a defendant does not have a right to choose his

[7] The right to self-representation established in Faretta has never been held to be absolute, and in Faretta itself, the Court acknowledged that a trial judge may terminate self-representation if a defendant is deliberately disruptive. 422 U.S. at 834 n.46. In McKaskle v. Wiggins, 465 U.S. 168, 177 (1984), the Court held that standby counsel could intervene contrary to the defendant's wishes so long as the defendant "had a fair opportunity to present his case in his own way." Pro se defendants also must generally accept unsolicited help or hindrance from the judge, prosecutor, or amicus counsel appointed to assist the court. Id. at 177 n.7.

sentence; that decision is made by society through constitutionally valid legislative enactments.

Turning to the second premise, the case-by-case approach has not resulted in reliable or uniform sentencing. In cases where special counsel is appointed, the trial court and this Court make their determinations as to whether death is appropriate based on full consideration all the available mitigating evidence, as presented by special counsel in a true adversarial context. See, e.g., Russ v. State, 73 So. 2d 178 (Fla. 2011); Barnes; Klokoc.

In cases where the judge does not appoint special counsel but calls on its own persons the judge believes can provide mitigation evidence, the trial court and this Court determine whether death is appropriate based on the evidence the trial court determines could be mitigating. See Petit.

Finally, in cases where defense counsel has proffered mitigating evidence pursuant to Koon, whether the trial court accepts the evidence as proved or not, the trial court and this Court determine whether death is appropriate based on a subset of the available mitigating evidence. Neither option results in "fair, reliable, and uniform sentencing" because, as Justice Pariente pointed out in Ocha, a proffer does not provide the specific facts necessary for the trial court to determine whether the evidence is credible, truly mitigating, and what

weight to give it. For example, counsel's proffer that the defendant suffered "abuse and neglect" and had a "troubled childhood" does not have the same impact as the testimony of an expert like that in State v. Lewis, 838 So. 2d 1102 (Fla. 2003). In Lewis, a clinical psychologist concluded that Lewis suffered from "multiple psychological and organic disabilities and that he is the product of an environment in which he was severely psychologically and physically damaged." She specifically testified:

> [I]f you exposed any child to the series of events to which he was exposed, I think the guaranteed outcome would be extraordinary dysfunction. It might look different ways, but this would be a truly damaged individual... [W[e're talking about a severity of physical and psychological torture that would destroy any child.

Id. at 1111. Under current law, if a proffer suggests the possibility of significant mitigation, the trial court may, but has no obligation, to hear or consider that evidence. This obviously results in disparate sentencing.

This Court has recognized that the constitution requires individualized sentencing, which in turn requires "full consideration of evidence that mitigates against the death penalty." See Penry v. Lynaugh, 492 So. 2d 302, 327-328 (1989). Under the current state of the law, the trial judge is responsible for deciding what mitigating evidence should be presented. Not only does this result in unequal sentencing, the

person responsible for deciding whether life or death is the appropriate penalty should not also be responsible for deciding what evidence should be presented on one side of the equation. When a trial judge decides which witnesses to call as court witnesses, the judge, in effect, is acting as public counsel, albeit, without the same ethical duty to fully investigate, present, and argue the case for mitigation.

This Court recognized in Klokoc that a meaningful appeal requires "an adversary proceeding with diligent appellate advocacy." A meaningful penalty phase also requires a true adversarial proceeding. A sentence of death resulting from anything less than a full airing of the relevant facts in mitigation does not meet the constitutional standards of reliability recognized by this Court. Accordingly, this Court should recede from Hamblen and require the appointment of special counsel to present the case for mitigation in all cases where the defendant declines to do so.

Issue 3

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Sparre's Motion to Declare Florida's Death Sentencing Procedure Unconstitutional under Ring. R2:377-91. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2009), does not provide for such jury determinations.

Sparre acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.),

cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, Sparre is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 4, and cases cited therein); Steele. At this time, Sparre asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Sparre's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issues 1 and 2, vacate appellant's death sentence and reverse for a new penalty phase proceeding; Issue 3, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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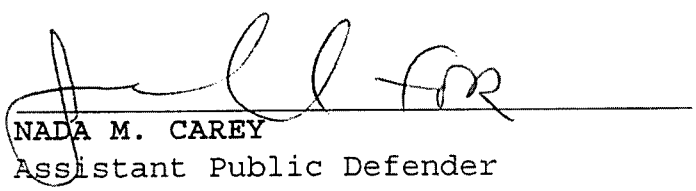
CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, at capapp@myfloridalegal.com; and by U. S. Mail to David Kelsey Sparre, DOC # J46231, Florida State Prison, 7819 NW 228th St., Raiford, FL 32026-1000, this 13th day of December, 2012. I hereby certify that this brief has been prepared using Courier New 12 point font.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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IN THE SUPREME COURT OF FLORIDA

DAVID KELSEY SPARRE,

Appellant,

v.

CASE NO. SC12-891
L.T. Case NO. 10-CF-8424

STATE OF FLORIDA,

Appellee.
_____/

INDEX TO APPENDIX

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

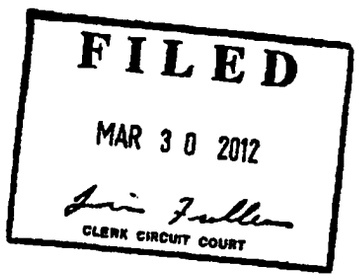
CASE NO.: 16-2010-CF-8424-AXXX-MA

DIVISION: CR-G

STATE OF FLORIDA,

vs.

DAVID KELSEY SPARRE,
Defendant.
_____/



SENTENCING ORDER

The Defendant, David Kelsey Sparre, was tried for the murder of Tiara Pool. The murder occurred on or between July 8, 2010, and July 12, 2010. The guilt phase of the trial commenced on November 29, 2011, wherein the jury returned a verdict on December 2, 2011, finding the Defendant guilty of First Degree Murder. By a special verdict form, the jury determined the Defendant was guilty on both of the State's first-degree murder theories: premeditated murder and felony murder. The jury further found the killing was done during the commission of a burglary and the Defendant did carry, display, or use a weapon during the commission of the offense.

The penalty phase commenced on December 13, 2011. The State presented the victim impact testimony of Michael Pool, Thelma Summers, and Valerie Speed. The Defendant waived presentation of any mitigation evidence. The jury returned a recommendation, by a unanimous vote of twelve-to-zero, that the Defendant be sentenced to death for the murder of Tiara Pool.

A separate Spencer[1] hearing was held on January 27, 2012. During the Spencer hearing, the Defendant again waived presentation of any mitigation evidence. The Defendant testified he did not

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

want any of the available witnesses to testify. The State attempted to introduce a letter written by the Defendant after the conclusion of the penalty phase. This Court took the matter under advisement. The Defendant filed a Motion to Preclude State From Introducing Additional Aggravating Circumstances. The State argued that the letter was not evidence of an additional aggravator, but was instead additional proof of the aggravating circumstances already presented. On February 9, 2012, this Court entered an Order allowing admission of the letter into evidence. Following the Spencer hearing, each party also presented to this Court their memorandum in support of and in opposition to the death penalty.

In imposing sentence, this Court has taken into account all of the evidence presented during the trial, including the guilt and penalty phases, the Spencer hearing, the sentencing memoranda submitted by the parties, as well as the Presentence Investigation Report[2] ("PSI"). The sentencing memoranda specifically addressed each of the aggravating and mitigating circumstances which this Court is asked to consider in imposing this sentence. Based on the evidence presented and the argument of counsel, this Court now finds as follows:

FACTS

On July 1, 2010, 21-year-old Tiara Pool placed a posting on Craigslist seeking male friendship. Tiara Pool's husband was on deployment at sea and their two small children were out of town with grandparents. On July 5, 2010, the Defendant, who lived in Georgia, responded to Tiara Pool's posting. The two proceeded to communicate via phone and text messages. They arranged to see each other on July 8, 2010, as the Defendant was bringing his grandmother to

[2]This Court did not consider the Probation Officer's agreement with the jury's recommendation to impose the death penalty on the Defendant.

Jacksonville for a heart procedure scheduled at St. Vincent's Hospital.

On July 8, 2010, the Defendant took his grandmother to her appointment at St. Vincent's Hospital. A surveillance video from the hospital showed that Tiara Pool met the Defendant inside the hospital around 2:40 p.m. The video also showed her and the Defendant leaving the hospital together around 3:20 p.m. The last outgoing activity ever sent from Tiara Pool's cell phone occurred at 3:54 p.m. Before the Defendant returned to the hospital, he sent a text message to Tiara Pool stating they could not meet later at the hospital. At 5:54 p.m., the Defendant returned to the hospital alone. The Defendant was carrying a duffel bag that he did not previously have. The Defendant eventually took his grandmother back to Georgia.

On July 12, 2010, Nichelle Edwards, a friend of Tiara Pool, and babysitter of her children, became worried after not having seen or heard from Tiara Pool. Ms. Edward's went to Tiara Pool's apartment to check on her and entered when there was no answer at the door. Once inside, Ms. Edwards saw the bedroom door was cracked opened, and she could see Tiara Pool's hand on the floor. Ms. Edwards immediately exited the apartment and called the police. The Jacksonville Sheriff's Office responded and found Tiara Pool, who was deceased, laying on the bedroom floor of her apartment. Tiara Pool had been stabbed to death and there was blood on the floor, walls, and bed.

The murder scene had been cleaned, evidenced by a bottle of cleaner found on the bed. A large knife, which matched the kitchen knife set, was found propped up against the tub in the bathroom. The blade of the knife was bowed and the tip was broken. The tip of the knife was recovered from Tiara Pool's skull. The knife had been cleaned, but DNA experts were able to recover touch DNA from the knife. The DNA found on the knife was consistent with the

Defendant's DNA.

There were no signs of forced entry into Tiara Pool's apartment. Her purse had been rummaged through, but her cell phone was left at the apartment. A PlayStation, blue-ray DVD, and cable modem were all missing from the apartment. Tiara Pool's keys and car were also missing. The car was later recovered one block away from St. Vincent's Hospital and had been wiped clean. The driver's seat was positioned in such a manner that 5'3" Tiara Pool could not have reached the pedals. Detectives examined Tiara Pool's cell phone and determined that one of the last people she had contact with was the Defendant.

Dr. Jesse Giles performed an autopsy on the body of Tiara Pool and determined she died from multiple sharp force injuries. Tiara Pool sustained eighty-eight (88) sharp force injuries to her head, neck, upper chest, back, upper arms, hands, and right thigh. These injuries included thirty-nine (39) defensive wounds to both of Tiara Pool's hands. The fatal injuries were stab wounds to the upper back, which penetrated the lungs, and a side-to-side neck slash. Dr. Giles stated that the fatal wounds occurred closer to the end of the attack. Dr. Giles opined that Tiara Pool was alive and conscious during the entire attack.

On July 14, 2010, Jacksonville Sheriff's Office homicide detectives drove to Georgia to contact the Defendant. They informed the Defendant they were conducting a homicide investigation and that he had spoken to the victim on the phone. The Defendant agreed to be interviewed at the Brantley County Sheriff's Office. The interview was videotaped. The Defendant stated that he had traveled to Jacksonville on the morning of July 8, 2010, to take his grandmother to St. Vincent's Hospital. The Defendant admitted that he met Tiara Pool through Craigslist and that they had subsequently communicated via phone and text messages. The Defendant also admitted Tiara Pool

met him at the hospital and that they went back to her apartment. The Defendant stated once they were at her apartment they had consensual sex and took showers afterwards. The Defendant said that Tiara Pool then drove him back to the hospital.

The Defendant stated the two had plans to meet again that evening, but that he sent Tiara Pool a text message advising her not to come back to the hospital. The Defendant stated that after he was dropped off at the hospital he never spoke with Tiara Pool again. Although the Defendant claimed to have sent the text message to Tiara Pool from the hospital, the evidence showed he actually sent the text message while en route back to the hospital.

On July 24, 2010, the Detectives traveled to Charleston, South Carolina where the Defendant was staying with family. The Defendant was interviewed again. The interview was videotaped and the Defendant waived his Miranda rights. The Defendant provided several different versions of what happened on the day that Tiara Pool was murdered.

First, the Defendant recited the same story that he had told to the Detectives in Georgia. Next, the Defendant stated that after he and Tiara Pool had sex, he went to the store to get cigarettes. The Defendant stated when he returned, he found Tiara Pool's dead body. The Defendant said he panicked and took her car. When asked why he took the PlayStation, the Defendant stated he did not know. The Defendant also told the Detectives that blood stinks and does not come off of clothes.

The Defendant then changed the version of events and claimed that the murder was committed in self-defense. The Defendant stated after he and Tiara Pool had sex, he was taking a shower and she came at him with a knife. The Defendant said he blacked-out and did not remember how he killed Tiara Pool. The Defendant claimed that once he realized what had happened, he cleaned the scene and fled because no one would believe he acted in self-defense. Again, the

Defendant did not know why he took the PlayStation.

Finally, the Defendant admitted to murdering Tiara Pool. The Defendant stated that he did not know why he murdered her, but that he did not act in self-defense. The Defendant explained to the Detectives that he killed Tiara Pool by her bedroom door, and that he must have stabbed her more than once because there was a lot of blood. The Defendant admitted to taking and pawning the PlayStation. The Defendant also admitted to taking a wireless router that he claimed to have thrown out of a window on the expressway. The Defendant explained that he had learned a lot from watching CSI on television and detailed how he cleaned the murder scene and how he burned his clothes upon returning to Georgia. The Defendant was subsequently arrested.

Records were retrieved from a pawnshop in Georgia which indicated the Defendant had pawned a PlayStation. The Detectives located the burn pile where the Defendant claimed to have burned his clothes. The blue-ray DVD was also retrieved and identified by Tiara Pool's husband during the trial.

At trial, Ashley Chewning, the Defendant's ex-girlfriend and mother of his daughter, testified. Before the Defendant was arrested, he told Ms. Chewning that he had killed a woman in Jacksonville and that he had taken the woman's PlayStation. Following his arrest, the Defendant wrote letters to Ms. Chewning. In one letter, the Defendant admitted to killing Tiara Pool and explained that he had "slumped" her.

The Defendant authored another letter to Ms. Chewning following the trial and penalty phase. This letter was confiscated by jail officers. In this letter, the Defendant wrote the following:

> I want to tell you the truth about why I killed that girl I knew I was going to Jaxnville [sic] a week before I even started looking for a potential victim. I wanted to try something just to see how it felt. I'm pretty intelligent when it

comes to cleaning up crime scenes and criminal procedures I knew the police would come talk to me so I had the perfect alibi. Me taking my grandma to the doctor. She was perfect it took over 5 minutes to kill her. She was on the bed laying on her stomach when I first started then we moved on to by the bedroom door after she quit fighting I tilted her head and sliced her throat. Yes I planned on doing what I did. You want the truth? I did it for the rush. I planned for a week & a half how I would do it. I'm not even gonna lie. I enjoyed it & I hope to do it again. . . . I mean I never stabbed somebody & so I just thought it would be a good rush so I did it. Anyways the point I'm getting at is that I did what I did because I could & I almost got away with it.

AGGRAVATING CIRCUMSTANCES

The State proposed two aggravating circumstances: (1) The capital felony was especially heinous, atrocious, or cruel; and (2) The capital felony was committed while the Defendant was engaged in the commission of a burglary.

During the guilt and penalty phases, the State proved the following aggravating circumstances beyond a reasonable doubt:

1. **The capital felony was especially heinous, atrocious, or cruel. § 921.141(5)(h), Fla. Stat.**

The heinous, atrocious, or cruel aggravator ("HAC") is one of the most weighty aggravators. Offord v. State, 959 So. 2d 187, 191 (Fla. 2007) ; Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002). To qualify for the HAC aggravator, "the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." Hertz v. State, 803 So. 2d 629, 651 (Fla. 2001) (citation omitted). The HAC aggravator applies to murders which "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998). This 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). The

evidence presented at trial establishes beyond all reasonable doubt the existence of this aggravating circumstance.

Dr. Jesse Giles testified as to Tiara Pool's cause of death. Tiara Pool died from multiple sharp force injuries. Specifically, Tiara Pool had eighty-eight (88) sharp force injuries to her head, neck, upper chest, back, upper arms, hands, and right thigh. The majority of the injuries were to her head and neck. These injuries included a stab wound to the upper right forehead, which penetrated the skull, four (4) incisions below the right eye, and two (2) stab wounds in front of the right ear. The fatal injuries were stab wounds to the upper back, which penetrated the lungs, and a severe side-to-side neck slash. The neck slash penetrated her right jugular vein and larynx. Dr. Giles testified the fatal wounds occurred near the end of the attack. Tiara Pool also had thirty-nine (39) defensive stab wounds to her hands. Dr. Giles opined that Tiara Pool was alive and conscious during the entire attack.

The evidence established that the Defendant's attack on Tiara Pool was pitiless. The Defendant brutally and repeatedly stabbed Tiara Pool, leaving her with eighty-eight (88) injuries. The torturous nature of the Defendant's attack was evidenced not only by the numerous and savage stab wounds, but also by the force behind his attack. The Defendant stabbed with such force during one of the stabs that the knife bowed and the tip broke off and stuck in Tiara Pool's skull. The defensive wounds to Tiara Pool's hands indicate that she fought for her life. However, her struggle to escape the Defendant's vicious attack was to no avail. Instead, she fought in vain, acutely aware of her impending death, before the Defendant inflicted the final fatal wounds. The evidence presented during the trial proves beyond all reasonable doubt the existence of the HAC aggravating circumstance. See Owen v. State, 862 So. 2d 687, 698-99 (Fla. 2003) (affirming the HAC

aggravator where the victim was stabbed or cut 18 times and was alive while the injuries were inflicted); Guzman, 721 So. 2d at 1159 (upholding the HAC aggravator where the victim was stabbed and cut 19 times and was conscious during at least part of the attack); Williamson v. State, 681 So. 2d 688, 698 (Fla. 1996) (upholding the HAC aggravator where the victim was stabbed to death); Finney v. State, 660 So. 2d 674, 685 (Fla. 1995) (upholding the HAC aggravator where the victim was stabbed 13 times in the back).

In addition to the substantial evidence presented at trial establishing that the murder of Tiara Pool was heinous, atrocious, and cruel, the letter authored by the Defendant following the penalty phase provides even further support for this aggravator. In the letter, the Defendant stated that he "wanted to try something just to see how it felt." The Defendant detailed how he killed Tiara Pool, stating that "it took over 5 minutes to kill her. She was on the bed laying on her stomach when I first started then we moved on to by the bedroom door after she quit fighting I tilted her head & sliced her throat." The Defendant also stated that he enjoyed it and that he did it because he thought it would be a good rush. As the evidence demonstrated, and as this letter confirmed, Tiara Pool was aware of her impending death and fought hard for her life. These statements from the Defendant highlight that he was utterly indifferent to the suffering of Tiara Pool and, further, that he even enjoyed the suffering of Tiara Pool. This aggravating circumstance has been given great weight in determining the sentence to be imposed.

2. **The capital felony was committed while the Defendant was engaged in the commission of a burglary. § 921.141(5)(d), Fla. Stat.**

The jury's verdict in the guilt phase, finding that the killing was done during the commission of a burglary, proves this aggravating circumstance beyond a reasonable doubt. In addition, this

Court independently finds that this aggravating circumstance has been proven. The evidence introduced at trial established that the Defendant entered the apartment of Tiara Pool, and remained therein, after permission to remain had been withdrawn and with the intent to commit an offense therein, or with the intent to commit a forcible felony inside the apartment. The Defendant was invited into Tiara Pool's apartment, where he subsequently attacked Tiara Pool and stabbed her to death.[3] The Defendant also took a PlayStation, a DVD, and a wireless router from Tiara Pool's apartment. Additionally, the letter authored by the Defendant following the penalty phase confirms he committed a burglary, in that he states that he entered the apartment with the intent to kill Tiara Pool. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

MITIGATING CIRCUMSTANCES

During the penalty phase and the Spencer hearing, the Defendant waived the presentation of mitigation evidence. It is well-settled that a defendant, having been convicted of First Degree Murder, may waive his right to present mitigating evidence during the penalty phase. Spann v. State, 857 So. 2d 845, 853 (Fla. 2003). This Court performed a Koon inquiry, ensuring that the Defendant's waiver was knowing, not coerced, and not due to defense counsel's failure to fully investigate penalty phase issues. Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993). The Defendant never vacillated in his decision to waive the presentation of his mitigation evidence and consistently

[3]Although this aggravating circumstance was established at trial, this Court received further evidence that the Defendant entered the apartment of Tiara Pool with the intent to commit a forcible felony while inside. In the letter written by the Defendant after the penalty phase, he explained that he had looked for a potential victim and that he had planned how he would murder the victim for over a week.

testified that he did not want any of the available mitigation witnesses to testify. The Defendant's waiver was knowingly, voluntarily, and intelligently made.

This Court is cognizant that when a defendant waives his right to present mitigation evidence, the trial court is required to order the preparation of a PSI, and may in its discretion call witnesses to testify to mitigation evidence if the PSI reveals evidence of significant mitigation. Russ v. State, 73 So. 3d 178, 189 (Fla. 2011). "Mitigating evidence must be considered and weighed when contained 'anywhere in the record, to the extent it is believable and uncontroverted.'" Id. at 190 (quoting LaMarca v. State, 785 So. 2d 1209, 1212 (Fla. 2001)). A PSI was ordered on December 13, 2011. This Court has carefully considered the entire record, including the PSI, in evaluating the mitigating circumstances.

STATUTORY MITIGATING CIRCUMSTANCES[4]

This Court instructed the jury on the following statutory mitigating circumstances:

1. **The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. § 921.141(6)(b), Fla. Stat.**

The Defendant argues he suffered from a mental or emotional disturbance at the time of the crime which impaired his capacity to appreciate the criminality of his conduct or to conform to the requirements of the law. In support of this circumstance, the Defense states the Defendant came from a dysfunctional home, endured physical and emotional abuse, and lacked a good support system. No evidence established the Defendant was under the influence of extreme mental or

[4]Only the below listed statutory mitigating circumstances were presented to the jury. However, in an abundance of caution, this Court has reviewed each remaining statutory mitigating circumstance and now finds that no evidence has been presented to support any of the other enumerated statutory mitigating circumstances.

emotional disturbance.[5] In fact, the evidence established the contrary. After the Defendant murdered Tiara Pool, he took actions to conceal his involvement. He cleaned the murder scene, he tried to establish an alibi by sending a text to Tiara Pool, he parked Tiara Pool's car away from the hospital, and he burned the clothes he wore on the day of the murder. He bragged to the detectives he was able to clean up any evidence that would identify him as the killer. Additionally, the statements made by the Defendant in his letter, refute this mitigating circumstance. He stated that he looked for a potential victim, that he wanted to murder someone "just to see how it felt," that he was "pretty intelligent when it comes to cleaning up crime scenes," that he "had the perfect alibi," that he "planned for a week & a half" how he would murder the victim, and that he did what he did because he could and he almost got away with it. Thus, this Court finds the Defendant was not under the influence of extreme mental or emotional disturbance. See Ault v. State, 53 So. 3d 175, 189 (Fla. 2010) (a defendant's admission that he planned the abduction and assault of the victims in advance, as well as actions taken to conceal his involvement, negated a finding that he was under the influence of extreme emotional or mental disturbance). This Court finds this mitigating circumstance was not proven and gives it no weight in determining the appropriate sentence to be imposed.

2. **The age of the Defendant at the time of the crime. § 921.141(6)(g), Fla. Stat.**

In applying this mitigating factor to a non-minor defendant, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional

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[5]The Defense proffered the names of the available witnesses and what their testimony would entail. With regard to this mitigating circumstance, the Defense states that three doctors (Drs. Greenberg, Alligood, and Krop) would have testified that the Defendant suffered from Post Traumatic Stress Disorder. However, this Court is not required to accept this mitigating circumstance as proven based on this proffer. See Russ, 73 So. 3d at 190 (quoting LaMarca, 785 So. 2d at 1216).

immaturity, mental problems, or inability to take responsibility for or appreciate the consequences of his acts. Caballero v. State, 851 So. 2d 655 (Fla. 2003); Hurst v. State, 819 So. 2d 689 (Fla. 2002). This Court is cognizant the closer a "defendant is to the age where the death penalty is constitutionally barred, the weightier [the age] statutory mitigator becomes." Bell v. State, 841 So. 2d 329, 335 (Fla. 2002) (citing Urbin v. State, 714 So. 2d 411, 418 (Fla. 1998)). The Defendant was nineteen (19) years old at the time that he murdered Tiara Pool. There was no evidence of significant emotional immaturity or inability of the Defendant to take responsibility for his actions. The Defendant had received his GED, had served in the Army National Guard for a year, and was a father. However, given the Defendant was nineteen (19) at the time of the murder, this Court finds this mitigating circumstance was proven and gives it moderate weight in determining the appropriate sentence to be imposed in this case.

3. **The existence of any other factors in the Defendant's background that would mitigate against the imposition of the death penalty. § 921.141(6)(h), Fla. Stat.**

A. The Defendant accepts responsibility for his actions.

The Defendant argues he admitted his culpability, accepted responsibility, and expressed remorse for the murder of Tiara Pool during his interrogation. However, the Defendant only admitted to the murder after telling several untruthful stories regarding Tiara Pool's death. Further, the statements made by the Defendant in his post-penalty phase letter show that he is not remorseful. The Defendant stated "I'm not even gonna lie. I enjoyed it & I hope to do it again." This Court finds this mitigating circumstance was proven and gives it little weight in determining the appropriate sentence to be imposed in this case.

B. **The Defendant's judgment was impaired.**

The Defendant argues he was not in a state of mind where he could make clear and rational decisions when he murdered Tiara Pool. The Defendant argues that this mitigating circumstance was evidenced through the interrogation videos. The Defendant also argues his lack of social and mental development led to his poor decision making processes. No evidence was introduced which showed the Defendant's judgment was impaired.[6] This Court finds this mitigating circumstance was not proven and gives it no weight in determining the appropriate sentence to be imposed.

C. **The Defendant was under the influence of drugs.**

In support of this mitigating circumstance, the Defendant points to his interrogation videos, in which he told the detectives he took drugs before and after murdering Tiara Pool. However, the interrogation video reveals the Defendant was not on drugs when he murdered Tiara Pool. The Defendant stated he took hydrocodone from Tiara Pool's purse, and took the pills after murdering her. Further, the Defendant's actions after the murder indicate that he was in full control of his faculties. The Defendant cleaned the scene. The Defendant took Tiara Pool's car, and despite being a Georgia resident, navigated his way back to the hospital and parked a block away. The Defendant also attempted to set up an alibi and sent Tiara Pool a text telling her not to return to the hospital. A hospital surveillance video shows the Defendant entering the hospital following the murder, and the Defendant appears to be completely coherent. Further, the Defendant's post-penalty phase letter indicates that the murder was planned, and not a product of intoxication. This Court finds this

[6]Defense counsel states that Dr. Krop would have testified that the Defendant's decision making processes were based on immaturity and impulsiveness. However, this Court is not required to accept this mitigating circumstance as proven based on this proffer. See Russ, 73 So. 3d at 190.

mitigating circumstance was not proven and gives it no weight in determining the appropriate sentence to be imposed.

D. The Defendant has been neglected.

In the PSI, the Defendant reported that he was raised intermittently by his mother, grandmother, and sister. His mother was married seven (7) times and would move when she entered into relationships with men. When the Defendant was thirteen (13) years old, he was placed in the Tara Hall Home for Boys in South Carolina.[7] Based on the limited information before this Court, this Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.

E. The Defendant suffers from emotional deprivation. The Defendant was emotionally abused.

The Defendant argues that his dysfunctional family life and lack of parental support caused him to suffer from emotional deprivation.[8] The Defendant also argues he was emotionally abused by his mother and step-fathers. There is limited information before this Court, however, based on the Defendant's unstable home life, one would logically conclude that such an upbringing would lead to emotional issues. Thus, this Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.

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[7]The Defense was prepared to present the testimony of the Defendant's mother, grandmother, and two counselors from the Tara Hall Home for Boys with regard to the issue of neglect and abandonment of the Defendant. While this Court is not required to accept this mitigating circumstance as proven based on this proffer, see Russ, 73 So. 3d at 190., this Court finds such circumstance was proven based on the evidence before this Court.

[8]The Defense was prepared to present the testimony of Dr. Krop and Dr. Greenberg to testify to issue of emotional deprivation. While this Court is not required to accept this mitigating circumstance as proven based on this proffer, see Russ, 73 So. 3d at 190., this Court finds such circumstance was proven based on the evidence before this Court.

F. **The Defendant was physically abused.**

In the PSI, the Defendant reported he was beaten by one of his step-fathers.[9] Additionally, during the Defendant's July 24, 2010 interrogation, he stated both his mother and step-father beat him. This Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.

G. **The incident was situational.**

The Defendant argues the murder was committed in an unsophisticated manner and did not evidence preplanning. However, the evidence indicates to the contrary, in that the Defendant cleaned the murder scene, tried to establish an alibi by sending a text to Tiara Pool, and parked Tiara Pool's car away from the hospital. Further, in the Defendant's post-penalty phase letter, he states the murder was planned. This Court finds this mitigating circumstance was not proven and gives it no weight in determining the appropriate sentence to be imposed.

H. **The Defendant has a lack of a good support system.**

The Defendant stated to the detectives that his family does not want anything to do with him. In the PSI, the Defendant reported he was raised intermittently by his mother, grandmother, and sister. The Defendant did not have any significant contact with his father until he was twelve (12) years old. However, the Defendant also stated his grandmother tried to provide stability in his life. This Court finds this mitigating circumstance was proven and gives it little weight in determining the appropriate sentence to be imposed.

I. **The Defendant's father was absent from his life.**

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[9]The Defense was also prepared to present the testimony of the Defendant's sister, grandmother, and aunt to testify to this mitigating circumstance.

In the PSI, the Defendant stated he did not have any significant contact with his father until he was twelve (12) years old. This Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.

J. The Defendant is good at fixing things.

During his interrogation, the Defendant stated to the detectives he was "good at anything." He stated he could do electrical work, could weld things, could work on cars, and could lay bricks, tile, and vinyl. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

K. The Defendant dropped out of high school but obtained a GED.

In the PSI, the Defendant reported he finished the tenth grade and dropped out of high school. He stated that he made Cs and Ds because he did not take the time to study. The Defendant's grandmother reported that he completed his GED in 2008. Additionally, the Defendant stated to the detectives that he received his GED and went through the Youth Challenge Academy. This Court finds this mitigating circumstance was proven and gives it little weight in determining the appropriate sentence to be imposed.

L. While the Defendant was in high school he participated in the ROTC Program and served in the U.S. Military.

The evidence established the Defendant served in the military. The Defendant stated to the Detectives that he served in the Army. In the PSI, the Defendant reported he served in the Army National Guard for a year. This Court finds this mitigating circumstance was proven and gives it slight weight in determining the appropriate sentence to be imposed.

M. The Defendant is devoted to his grandmother.

The Defendant stated to the detectives that he takes care of his grandmother. The Defendant drove his grandmother to Jacksonville for a heart procedure at St. Vincent's Hospital. Nevertheless, while the Defendant's grandmother was having the procedure, he arranged to leave the hospital with Tiara Pool. He then had sex with and brutally murdered Tiara Pool before returning to take his grandmother home. Thus, the Defendant was not completely devoted to his grandmother. This Court finds this mitigating circumstance was proven and gives it little weight in determining the appropriate sentence to be imposed.

N. The Defendant has a child.

This Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.

O. The Defendant loves his family.

This Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.

P. The Defendant's family loves him.

This Court finds this mitigating circumstance was proven and gives it some weight in determining the appropriate sentence to be imposed.

CONCLUSION

Although this Court is typically required to give great weight to the jury's recommendation[10], this Court has lessened its reliance on the jury's recommendation because no mitigating evidence

[10] Blackwood v. State, 946 So. 2d 960 (Fla. 2006); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (stating that under Florida's death penalty statute, the jury recommendation should be given great weight).

was presented to them.[11] This Court has carefully considered and weighed the aggravating and mitigating circumstances found to exist in this case. Understanding this is not a quantitative analysis, but one which requires qualitative analysis, this Court has assigned an appropriate weight to each aggravating circumstance and each mitigating circumstance as set forth in this Order. On balance, especially considering the heinous nature of Tiara Pool's murder, the aggravating circumstances in this case far outweigh the mitigating circumstances. The ultimate penalty which this Court can impose should be imposed. David Kelsey Sparre, you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all. The scales of life versus death for the murder of Tiara Pool tilt unquestionably to the side of death.

[11] See Muhammad v. State, 782 So. 2d 343, 362-63 (Fla. 2001) (reversible error occurred where the trial court gave great weight to the jury's recommendation when the jury did not hear any evidence in mitigation).

It is therefore;

ORDERED AND ADJUDGED:

That you, David Kelsey Sparre, are hereby adjudicated guilty and sentenced to death for the murder of Tiara Pool. It is further ordered that you be transported to the Department of Corrections to be securely held on Florida's death row until this sentence can be carried out as provided by law. You shall receive credit for 612 days you already served.

You are hereby notified that this sentence is subject to automatic review by the Florida Supreme Court. Counsel will be appointed to represent you by separate Order.

David Kelsey Sparre, upon execution of this sentence by the State of Florida, may God have mercy on your soul.

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida this 30th day of March, 2012.

ELIZABETH SENTERFITT
CIRCUIT COURT JUDGE

Copies to:

Bernardo de la Rionda, Esquire
Office of the State Attorney

Refik Eler, Esquire
Michael Bateh, Esquire
Office of the Public Defender

Case No.: 16-2010-CF-8424-AXXX-MA