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IN THE SUPREME COURT OF FLORIDA

JAMES ROBERTSON,

Appellant,

v.

CASE NO. SC13-443
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR CHARLOTTE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

At Charlotte Correctional Institution, in the early morning hours of December 10, 2008, Appellant, James Robertson, murdered his cellmate, Frank Richard Hart, by strangling him to death. On May 27, 2009, the State filed an information charging Appellant with second degree murder. (V1:1-2).[1] At his first appearance, Robertson informed the judge that the charge should be first degree murder, not second degree, because the murder was premeditated. (V1:176-77).

On August 10, 2009, at Robertson's arraignment, his counsel, Assistant Public Defender Robert McCormack, informed the court that the State had offered Robertson a plea of life on the second degree murder charge, and if he did not accept the plea, the State was going to seek an indictment on a capital murder charge. (V2:239-42). Counsel further informed the court that Robertson did not want to be represented by the Public Defender's Office and was requesting different counsel. Robertson told the court that he did not want the Public Defender's Office because their attorneys were employees of the

[1] The State will cite to the record on appeal by referring to the volume number, followed by the page number (V__:___). The transcript of the plea/sentencing hearing contained in volume two is paginated separately and will be referred to as "2T." The

State of Florida. (V2:251). After conducting a Nelson/Faretta[2] hearing, the court granted Robertson's request to represent himself and appointed the Public Defender's Office as stand-by counsel.[3] (V2:260-61). The State then placed the plea offer on the record and indicated that Robertson could plead guilty to second degree murder and receive a life sentence, or face the possibility of the State seeking an indictment on a death penalty case. (V2:262). Robertson declined the plea offer. (V2:263).

On October 19, 2009, the Public Defender's Office filed a certification of conflict and regional counsel Steve Smith was appointed for Appellant. Smith indicated at a hearing on October 26, 2009, that someone from his office who was "capital qualified" would be coming onto the case. (SV1:24). In January, 2010, counsel filed a motion to withdraw and Joseph Cerino was appointed to represent Robertson. (SV2:220). Robertson subsequently filed a motion seeking the termination of Cerino's representation, and after conducting a Nelson hearing on April 28, 2010, the court denied Robertson's motion. (SV1:27-34). At

[2] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973); Faretta v. California, 422 U.S. 806 (1975).

[3] A few weeks later, Robertson changed his mind and allowed Assistant Public Defender McCormack to represent him. (SV1:8-12).

the hearing, Robertson again indicated that the murder was premeditated and questioned why the State had not changed the charge to first degree murder. (SV1:39-42).

Robertson continued to complain about Cerino's representation and the court conducted Nelson hearings on October 10, 2010, and January 19, 2011. (SV1:63-105, 110-24). At the latter Nelson hearing, trial counsel Cerino informed the court that his client wanted to pursue a legally and factually invalid defense blaming DOC for the murder, and based on this fact, counsel was having major communication difficulties with Robertson. Counsel further noted that Robertson wanted the death penalty, but the State had not charged him with first degree murder. (SV1:118-20). At the conclusion of the hearing, the court appointed new counsel for Robertson. (SV1:121).

On April 29, 2011, Robertson's counsel filed a notice of intent to raise an insanity defense and motion for examination regarding insanity. (SV2:238-41). The court appointed two experts to examine Robertson: Dr. Robert Silver and Dr. Frederick Schaerf. (SV2:242-44). Dr. Robert Silver, a psychologist, examined Robertson in August, 2011, and found that "at the time of the commission of the alleged offense, Mr. Robertson was not suffering from a mental illness or defect that affected his ability to reason such that he did not know what he

was doing or could not distinguish right from wrong." (V1:22, p.5) Dr. Silver was aware that Robertson intentionally killed his cellmate by strangling him and noted that Robertson wanted to receive the death penalty. (V1:22, p.4). Dr. Silver opined that Robertson "committed the alleged offense in a willful, deliberate manner with the intended aim of terminating his cellmate's life since he had reached the limit of his tolerance. He knew that his actions were wrong and he was aware of their consequences." (V1:22, p.5).

Dr. Frederick Schaerf, a forensic psychiatrist, likewise found that Robertson was not insane at the time of the murder. (V1:23). Dr. Schaerf stated in his October, 2011 report that Robertson "was not suffering from a mental infirmity, disease or defect at the time of the alleged offense." (V1:23, p.6). Rather, Dr. Schaerf concluded that Robertson's act of strangling his cellmate was "consistent with his personality structure and not a major mental illness." (V1:23, p.7). Robertson was facing a release date from prison of 2037, and after being confined for the past twenty-nine years and in close management for the past four years, Robertson was tired of being in a shared cell and purposefully chose to murder his cellmate so that he could be transferred to death row. (V1:23, p.2-3).

In January, 2012, Robertson's counsel moved to withdraw based on conflict and the court appointed Mark DeSisto to represent Robertson. (SV2:250-51, 255-56). In June, counsel informed the court that he had reviewed all of the discovery and had spoken with Robertson and Robertson wanted to enter into a plea for the death penalty. (SV1:174-78). At that time, Robertson was charged with second degree murder, and counsel indicated that he expected a decision from the State regarding the death penalty prior to the next scheduled case management conference. (SV1:178).

On October 1, 2012, Robertson's counsel filed a motion to appoint experts to determine his competency. (SV2:257). At a hearing on October 4, 2012, Robertson's counsel indicated that "this is the case that we're going to be setting down in November for a plea." (SV1:182). On October 11, 2012, the court conducted a hearing in which Robertson was in attendance and the parties indicated that they chose December 18, 2012, for the resolution of Robertson's case. Robertson's counsel indicated that the two experts were going to examine Robertson in a few days and their reports would be ready before December 18, 2012. Counsel further indicated that he was going to obtain some documentation from his client and would be providing that information to the court. (SV1:190-91). On October 26, 2012, the

State filed an indictment charging Robertson with first degree murder.[4] (V1:33-34).

On December 18, 2012, the court conducted a plea and sentencing hearing. (2T:1-89). At the outset of the hearing, the judge indicated that she had reviewed the presentence investigation (PSI); an affidavit from Robertson dated December 18, 2012; a stipulation signed by Robertson dated December 18, 2012; a stipulation regarding the findings from the medical examiner's autopsy; the Florida Department of Corrections' Office of the Inspector General Report of Investigation; the Office of the District Medical Examiner's Report of Autopsy Examination; a transcript of Robertson's first appearance on June 11, 2009; an affidavit of James Robertson dated October 9, 2012; the videotaped statement and transcript of James Robertson dated October 26, 2012; the competency evaluations from Drs. Silver and Schaerf; and the State's Notice of Aggravating Circumstances.[5] (2T:5-12).

Counsel for Robertson indicated to the court that Appellant was going to enter a guilty plea to premeditated, first degree murder and that Robertson was seeking the death penalty and was

[4] Joseph Lombardo, a death qualified attorney, filed his notice of appearance as co-counsel on October 26, 2012. (2T:17-18).

[5] The court indicated that she had reviewed a number of these documents *in camera*. (SV2:279-80).

waiving the right to have a jury for the penalty phase. (2T:20-31). The court accepted Robertson's plea and adopted the following factual stipulation:

> 1. Defendant and Frank Hart were cell mates at Charlotte Correctional Institution on December 10, 2008;
> 2. At approximately 12:41 a.m., Defendant, after having waited for and watched corrections officers complete their scheduled security check, obtained two socks and tied them together thereby fashioning himself a weapon;
> 3. At this time, Frank Hart was asleep in his bunk;
> 4. Defendant, knowing the time interval between security checks and having just observed a security check, knew that his window of opportunity to murder Frank Hart was approximately 20 to 30 minutes;
> 5. Defendant then woke Frank hart up, engaged in a brief conversation with Frank Hart and began strangling Frank Hart with the previously obtained weapon (the socks);
> 6. Frank Hart briefly struggled, and tried to kick the cell door before Defendant pulled him away from the door and finished strangling Frank Hart to death;
> 7. At the time of the strangling, Frank Hart was awake and conscious;
> 8. An autopsy on Frank Hart was conducted by Dr. Daniel Schultz, M.D., Associate Medical Examiner with the Office of the District Medical Examiner, District 22, who determined that Frank Hart died as a result of homicide by strangulation;
> 9. Prior to and during the murder, Frank Hart did not provoke Defendant into committing said murder nor was there any dispute, ongoing or otherwise, between the two men;
> 10. Defendant had been planning a murder for approximately 4 months prior to December 10, 2008 in an effort to obtain the death penalty;
> 11. Defendant chose Frank Hart as his victim because he, the Defendant, wanted and needed a smaller victim, one he could overpower;

> 12. Defendant had no specific reason to murder Frank Hart other than needing a victim in order to obtain his goal, to wit: receiving the death penalty;
>
> 13. Defendant, aware that Frank Hart was scheduled to be moved to another cell in the coming days, put his premeditated plan to murder Frank Hart into motion while he still had a smaller, easy to overpower potential victim in his cell;
>
> 14. Prior to and during the murder of Frank Hart, Defendant was not in a frenzy, panic or fit of rage nor was he angry or enraged with emotion;
>
> 15. Subsequent to the murder of Frank Hart, Defendant has neither tried to justify nor excuse said murder nor has he offered any pretense of moral or legal justification for said murder but has merely explained his reason and motive for murdering Frank Hart;
>
> 16. On October 19, 2012, during a videotaped statement with Investigators Barry Lewis and Jennifer LaDelfa, both with the Office of the State Attorney, Defendant admitted to planning the murder in advance and to carrying out the murder for the sole purpose of obtaining the death penalty. Defendant was represented by his attorney Mark DeSisto during said statement.

(SV2:276-78).

In addressing the aggravating circumstances, the State introduced certified copies of numerous judgments and sentences, including convictions for burglary of a structure and aggravated assault in 1980; escape in 1980; possession of contraband in prison in 1986; aggravated battery and inmate possession of a weapon in 1988; escape and two counts of battery on a law enforcement officer in 1988; inmate in possession of contraband in 1989; attempted first-degree murder and possession of a weapon by an inmate in 1997. (2T:36-39; V1:38-75). In addition

to the certified copies of Robertson's convictions, the State introduced into evidence a letter from the Office of Executive Clemency indicating the Robertson has never had his civil rights restored; a transcript of a videotaped statement made by Robertson on October 19, 2012 and an affidavit signed by him on the same date; a transcript of Robertson's first appearance; the DOC Inspector General's report; and the autopsy report. (2T:39-43).

The State also presented testimony from Mike Gottfried, a correctional probation officer, who testified that he prepared the presentence investigation (PSI) in this case and reviewed Robertson's psychological reports, DOC's housing reports, his prior record and disciplinary reports, and other documents for the offense. (2T:46). Gottfried testified that at the time of the murder, Robertson was serving a prison sentence for aggravated battery with a deadly weapon and introduction of a weapon into a prison facility. (2T:46-50). On cross-examination, Gottfried stated that he interviewed Robertson for over an hour and he never expressed remorse for the murder. Rather, Robertson candidly admitted that he purposefully committed the murder because he was tired of being confined to close management and wanted the death penalty. Gottfried explained that close management was for extremely dangerous inmates who posed a

danger to other inmates or to officers. (2T:50-52). While incarcerated for the instant murder, Robertson attempted to murder a corrections officer so that "people would take him seriously." (2T:52). In response to Robertson's counsel's question, Gottfried testified that, given his background and professional experience with DOC, he felt that Robertson's case warranted the death penalty. (2T:53).

After the State rested its penalty phase case, defense counsel called Robertson as a witness and he testified that he had committed the prior offenses and was also currently facing charges of attempted second-degree murder and attempted robbery with a deadly weapon for crimes committed while incarcerated at the Charlotte County Jail. (2T:57-58). Appellant testified that he has been incarcerated for 32 years and was going to continue killing people until he received the death penalty. Robertson testified that he had no remorse for the murder. (2T:58-60). Although Robertson was requesting the death penalty, he testified that he understood he would not receive a death sentence because of his request, but it would be based on the court's weighing of the aggravating and mitigating circumstances in his case. (2T:61).

After Robertson testified and placed his desire to receive the death penalty on the record, the prosecutor noted that the

court should not consider Robertson's lack of remorse or his intent to commit future crimes as aggravators in support of the death penalty. The court indicated that she would not find Robertson's answers to these questions as statutory aggravators. (2T:62). The State proceeded to make brief argument in support of four aggravating circumstances: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the defendant was previously convicted of a prior violent felony; (3) the murder was especially heinous, atrocious, or cruel; and (4) the murder was committed in a cold, calculated and premeditated manner without any pretense of a moral or legal justification. (2T:62-67). Defense counsel, consistent with Robertson's position, indicated that the defense did not object to any of the aggravators. (2T:68). The State reiterated to the court that its argument in support of the death penalty was limited to the four aggravating factors which had been proven and not Robertson's desires. (2T:68). Finally, defense counsel, "to make the record again," informed the trial judge that she had an obligation pursuant to Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), to discuss the waiver of mitigation by defense counsel and, pursuant to Muhammad v. State, 782 So. 2d 343 (Fla. 2001), had to consider all mitigation anywhere in the record. Defense counsel indicated

that he had previously supplied the court with a copy of the Koon opinion and was making the record "again," but it appears that this may have been done in chambers as there is no record of counsel previously mentioning the Koon decision or of the court making an inquiry into the waiver of mitigation despite the fact that the court indicated that she had done so.[6] (2T:69). Lastly, defense counsel indicated that Robertson did not meet any of the mitigating circumstances under section 921.141 subsections (a) through (h). (2T:69).

After taking a mid-afternoon break of ten minutes, the court returned an announced its sentence. The court stated:

> This cause comes before the Court on Defendant's stated intention to enter a plea of guilty to first degree premeditated murder so that he can receive the death penalty. Pursuant to his sworn affidavit, Defendant has waived his right to a trial, a penalty phase, presentation of mitigation evidence, and a sentencing hearing.
>
> Having reviewed the case file, and the parties having stipulated to the Court's in camera review of discovery, the Court hereby finds as follows:
>
> (A) DEFENDANT'S WISHES AND INTENT:
>
> Defendant has repeatedly expressed his wish to enter a plea of guilty to first degree murder, with the intention of receiving a sentence of death. At first appearance on June 11, 2009, Defendant stated that the charge should be first degree murder rather than second degree murder, because it was premeditated. Defendant stated in his October 19, 2012

[6] The court's stated, "I have, and I will" when informed of her obligations to conduct an inquiry into the waiver (Koon) and to consider all mitigation anywhere in the record (Muhammad).

affidavit that he wanted to plead guilty to first degree murder and receive a death sentence. He reiterated these statements to Dr. Silver according to Dr. Silver's October 19, 2012 report, and to Dr. Schaerf in Dr. Schaerf's report following his evaluation of Defendant on November 2, 2012. The Pre-Sentence Investigation (PSI) report references a forensic psychiatric evaluation of Defendant in October 19, 2011, where Defendant indicated he had been "thinking about how to go to death row" since 2008. In his recorded statement taken on October 19, 2012, Defendant indicated he had been thinking about how to get the death penalty since July 2008, and after murdering his cellmate, when he realized he was being charged with second degree murder, he wrote to five individuals in the State Attorney's Office in 2009 indicating the murder was premeditated and requesting the death penalty. In the recorded statement, Defendant told the investigators that if he did not receive the death penalty, he would continue to kill until he received it. Accordingly, the Court assigns **great weight** to the Defendant's wishes and intent.

(B) AGGRAVATING FACTORS:

1. The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. 921.141(5)(b), Fla. Stat.

The Court finds that there is competent, substantial evidence that was not rebutted that the Defendant was previously convicted of another felony involving the use of violence to the person. Specifically, the record shows that the Defendant was previously convicted of: three counts of aggravated battery on May 2, 1978; aggravated assault on May 11, 1980; aggravated battery with a deadly weapon on July 21, 1987; battery on a law enforcement officer on March 23, 1988; and attempted first degree murder on April 9, 1995. A charge of attempted murder of a law enforcement officer is pending as Case 11-CF-2336. The Court assigns this aggravating factor **moderate weight.**

2. The capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment or placed on community control or on felony probation. 921.141(5)(a), Fla. Stat.

The Court finds that there is competent, substantial evidence that was not rebutted that the Defendant was previously convicted of a felony and committed the instant capital felony while under a sentence of imprisonment. The record shows that, as stated above, Defendant was previously convicted of several felonies involving violence to person, in addition to other felonies, including multiple counts of burglary, grand theft of a motor vehicle, escape, transmitting contraband in a state facility, introducing a weapon into a state facility, and constructive possession of a weapon. In the transcript of the first appearance for this case, Defendant admitted he was currently in custody with a release date of 2038. The Court assigns this aggravating factor **moderate weight**.

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

In Diaz v. State, 860 So. 2d 960, 966 (Fla. 2003), the Florida Supreme Court wrote that

> heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim,

Therefore, in order for this aggravator to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim.

The record shows that this aggravating factor has been established by competent, substantial evidence that was not rebutted. In his recorded statement, Defendant admitted to waking the victim, and offering him the choice of being tortured or killed, while holding a rope made of socks tied together. When the victim ran to the cell door yelling for help, a struggle ensued, and the Defendant overpowered and strangled the victim. Defendant's recorded statement shows that the victim was in fear and fighting for his

life prior to Defendant overpowering him and strangling him. Defendant admits in that statement that he wanted to torture the victim, and would have killed the victim regardless. The Defendant's own statement shows the murder was conscienceless and pitiless and unnecessarily torturous to the victim. Defendant's statement is corroborated by the Inspector General's report, in which inmates interviewed stated they heard the victim screaming for help. Accordingly, the Court assigns **great weight** to the heinous, atrocious or cruel aggravator.

4. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat.

The record shows that this aggravating factor has been established by competent, substantial evidence that was not rebutted. In his recorded statement, Defendant indicates that he had been planning to kill someone in order to receive the death penalty since July 2008. He admits to assessing his weight relative to that of the victim and believed he could overpower the victim in the 30 minutes between cell checks. He did not care that the victim was vulnerable. Defendant described how he watched and waited for the guard to leave the cell block, then took two pair of socks from the victim's locker and one pair from his own and tied them together to make a rope with which to strangle the victim. After the victim was dead, Defendant admits in the recorded statement that he covered the victim up so it would look as if the victim was sleeping, read for a while, calmly slept despite the victim's dead body in the same small cell, and in the morning ate both his and the victim's breakfasts. The four elements for this aggravator are met. In this case, the killing was a product of cool and calm reflection over several months, Defendant had a careful plan to commit murder by strangulation with his and the victim's socks, Defendant exhibited heightened premeditation by assessing his and the victim's weights and timing the guards' cell checks, and there was no pretence or moral or legal justification. Evans v. State, 800 So. 2d 182, 192 (Fla. 2001). Accordingly, the Court assigns **great**

weight to the cold, calculated, and premeditated aggravator.

(C) MITIGATING FACTORS: "Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." Nelson v. State, 850 So. 2d 514, 529 (Fla. 2003). While Defendant waived presentation of mitigating evidence, the Court considered the information in the PSI, Defendant's recorded statement, and the evaluations conducted by the experts, for mitigating evidence. The Court finds that Defendant has a significant criminal history, was not an accomplice, was not under the domination of another person, was a mature 45 year old adult, and that there is no evidence his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired in any way. The mitigating factors applicable to Defendant and this case, and considered by the Court are as follows:

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.

This mitigator has been held to apply where the defendant's mental or emotional disturbance is "less than insanity but more than the emotions of an average man, however inflamed." State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Defendant admits in his recorded statement that he had been depressed due to being incarcerated for 30 years at the time of the offense, being kept in close management, not able to interact with other inmates, and deprived of recreation time. He told Dr. Silver "I have been locked up for 32 years... I am tired of being in prison, especially in the conditions... the confinement... I'm unable to interact... I'm locked up except for a few hours... I don't feel normal... my life is miserable... there's no pleasure... nothing to look forward to..." The Court finds that the mitigator has been established by the greater weight of the evidence and assigns it **little weight.**

2. The existence of any other factors in the defendant's background that would mitigate against

imposition of the death penalty. § 921.141(6)(h), Fla. Stat.

The Court has considered the possibility that other factors may exist in the Defendant's character, record or background that would mitigate against the imposition of the death penalty. Specifically, the Court has considered the following mitigating factors:

(a) From a genetic perspective, Defendant's father, mother, maternal aunt, paternal uncle, grandmother and grandfather were alcoholics or substance abusers.

(b) In early childhood, Defendant was very hyper.

(c) Defendant's poor family background of poverty, substance abuse and violence.

(d) Defendant has a background of substance abuse and criminal history, has been in custody continuously since 1980. Defendant has never had a job, a meaningful relationship, or a normal life.

(e) Defendant obtained his GED in 1982 while in prison.

The Court has thoroughly analyzed the possibility that some mitigation may exist in these areas. The PSI indicates that there is a family history of substance abuse and alcoholism. In the PSI, Defendant informed the interviewer that he and his mother had been beaten by his father. Defendant admitted his family was poor. Defendant admitted to using alcohol, smoking cigarettes, and using marijuana since age 12, and stated he had sniffed gasoline and toluene, and had used LSD, Quaaludes, Morphine, Valium, PCP, amphetamines and nasal inhalers. Defendant stated he had been very hyper as a child; this hyperactivity could be a sign of an underlying disorder. While Defendant had dropped out of school after the eighth grade, the PSI indicates he completed his GED in prison in 1982. Defendant's criminal history shows he has convictions from age 13, and has been continuously incarcerated since 1980, when he was 17. As a result of Defendant's background and continuous incarceration, it cannot be said that Defendant ever had a chance to have a normal life.

The Court finds that competent, uncontroverted evidence of mitigation exists. Accordingly, the Court assigns these mitigating factors **little weight.**

(D) SENTENCING CIRCUMSTANCE AND PROPORTIONALITY:

> In evaluating the aggravating and mitigating factors, the Court does not engage in a mere counting procedure, but instead makes a reasoned judgment based on the totality of the circumstances. *See* Terry v. State, 668 So. 2d 954 (Fla. 1996), In reaching this decision, the Court is mindful that, because death is a unique punishment in its finality, its application is reserved only for those cases where the most aggravating and least mitigating circumstances exist. Id.
>
> The totality of the aggravating circumstances in this case include the moderate weight of the Defendant's prior violent felony convictions and the commission of this capital felony while imprisoned, as well as the great weight assigned to heinous, atrocious and cruel manner of the offense, and that the murder was committed in a cold, calculated and premeditated manner. The Court also gave great weight to Defendant's wish and intent to be put to death. The totality of the mitigating circumstances include the little weight given to the fact that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the offense, and the little weight given to the nonstatutory mitigating factors found by the Court. The most logical interpretation of the evidence in this case is that the Defendant intentionally and ruthlessly strangled the victim in order to achieve his own ends, having the State put him to death, rather than lower his dignity to commit suicide. Defendant has stated his intention to continue killing until that objective is met. Given the facts of the case, Defendant's violent criminal history, and Defendant's statements, there is nothing in Defendant's background or mental state that would suggest that a death sentence is disproportionate. The aggravating circumstances outweigh the mitigating factors. This Court's review of other reported capital cases has led the Court to conclude that the death penalty is not disproportionate.

(V2:219-26).

On appeal to this Court, Robertson's appellate counsel filed motions to withdraw based on Robertson's desire to argue

in favor of the death penalty. On July 10, 2014, this Court, in a 4-3 decision, issued an opinion denying counsel's motion to withdraw and directing Robertson's appellate counsel to "continue to prosecute this appeal fully for the benefit of the Court in meeting its statutory and constitutional duties." Robertson v. State, 143 So. 3d 907, 910 (Fla. 2014). This Court further stated that Robertson could file a *pro se* supplemental brief setting forth his position regarding the appeal. Id.

SUMMARY OF THE ARGUMENT

The instant case is unique in that Appellant committed a premeditated, first degree murder while incarcerated in prison in order to receive the death penalty. Appellant proceeded to enter into a guilty plea, waived the right to a jury recommendation, and waived the presentation of any mitigation evidence before the trial judge. Contrary to Appellant's assertions, the court ordered the preparation of a comprehensive presentence investigation report (PSI) and was aware of all available mitigation evidence prior to sentencing Appellant to death. Finally, this Court should affirm Appellant's death sentence as any alleged procedural errors surrounding the imposition of his sentence were harmless given the circumstances of this case.

ARGUMENT

ISSUE

THIS COURT SHOULD AFFIRM APPELLANT'S CONVICTION AND SENTENCE AS ANY ALLEGED PROCEDURAL ERRORS BY THE TRIAL COURT IN IMPOSING THE DEATH SENTENCE WERE HARMLESS BEYOND A REASONABLE DOUBT.

The instant case involves the unusual situation of an incarcerated defendant who committed murder for the sole reason of wanting to obtain a death sentence.[7] Robertson eventually pleaded guilty to first degree murder and waived the presentation of mitigating evidence and the right to a jury recommendation based on his overwhelming desire to receive a death sentence. The trial judge, after considering all of the mitigating evidence in the case, found that the four aggravating circumstances outweighed the slight mitigation and sentenced Robertson to death.

In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), this Court addressed issues stemming from a case where the defendant

[7] As Robertson freely admitted on numerous occasions, he purposefully strangled his cellmate because he wanted the death penalty. When his desire to get the death penalty was not immediately made available to him based on the State's failure to initially charge him with first degree murder, Robertson attempted to murder a correctional officer with a homemade shank in order to demonstrate how serious he was in seeking a death sentence. Robertson likewise indicated that if he did not receive the death penalty, he would continue to kill fellow inmates or correctional officers until he received the death penalty.

represented himself, pleaded guilty to first degree murder, and waived the presentation of any mitigating evidence before the jury. Recognizing that "death is different," this Court rejected appellate counsel's argument that counsel should have been appointed below to represent society's interest in ensuring that the death penalty was properly imposed and found that a competent defendant has a constitutional right to represent himself. Id. at 802-04. This Court stated:

> In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have a right to control their own destinies. This does not mean that courts of this state can administer the death penalty by default. The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

Hamblen, 527 So. 2d at 804; see also Goode v. State, 365 So. 2d 381, 384 (Fla. 1978) ("Even though defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of the death sentence complies with all of the standards set by the Constitution, the Legislature and the courts.").

In the instant case, Robertson's trial attorney informed him that he could not waive his direct appeal to this Court if

sentenced to death (V1:167), but Robertson requested that his appellate counsel argue in favor of upholding the death penalty on appeal. Robertson's appellate counsel thereafter sought to withdraw, but a majority of this Court ruled that counsel must "continue to prosecute this appeal fully for the benefit of the Court in meeting its statutory and constitutional duties." Robertson v. State, 143 So. 3d 907, 910 (Fla. 2014). This Court further stated that Robertson could file a *pro se* supplemental brief setting forth his position regarding the appeal. Id.

Robertson's appellate counsel now argues that the death sentence must be reversed based on a number of alleged procedural and substantive errors. While the State recognizes that the trial court may not have fully complied with all of this Court's procedural requirements when dealing with a "death volunteer," the State submits that any procedural error in imposing the death sentence was harmless. The State further submits that there is a valid factual basis for the guilty plea and Robertson's death sentence is proportional.[8]

[8] Even when not raised by the parties, this Court reviews the validity of the guilty plea and the proportionality of the death sentence. See Barnes v. State, 29 So. 3d 1010, 1015 n.6 (Fla. 2010) (stating that this Court has mandatory duty to determine whether the defendant's guilty plea was knowing, intelligent, and voluntary); Eaglin v. State, 19 So. 3d 935, 949 (Fla. 2009) (holding that this Court is obligated to conduct a proportionality review of each death sentence).

Appellant argues that the death penalty was rendered "by default" in this case based on judicial error and alleged unethical conduct by Robertson's trial counsel. Specifically, counsel asserts: (A) that the court and defense counsel failed to follow the dictates of Koon v. Dugger, 619 So. 2d 246 (Fla. 1993); (B) that the PSI was inadequate and biased; and (C) that the judge predetermined the death sentence and improperly considered Robertson's wishes and intent. Finally, counsel argues that this Court should recede from Hamblen v. State, 527 So. 2d 800 (Fla. 1988), and require trial judges to appoint special counsel to investigate and present mitigation to the court.

A. Whether the trial court failed to comply with the procedural requirements of Koon v. Dugger, 619 So. 2d 246 (Fla. 1993)?

In Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), this Court addressed a postconviction claim alleging that trial counsel was ineffective for failing to investigate and present mitigating evidence. The unrebutted testimony at the postconviction hearing was that trial counsel failed to present *any* mitigating evidence because Koon had directed him not to do so. Id. at 249. Although finding no error in Koon's case, this Court expressed concern with "the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present

any mitigating evidence." Id. at 250. The court set forth the following prospective procedural rule for such situations:

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

Id.; Garcia v. State, 949 So. 2d 980, 985 (Fla. 2006) (noting the procedural requirements set forth in Koon and Muhammad v. State, 782 So. 2d 343 (Fla. 2001)).

In the instant case, Appellant argues that Robertson's trial counsel latched onto Robertson's desire to receive a death sentence and followed Robertson's instructions not to conduct any investigation into mitigation. Appellant further asserts that the record is devoid of any type of Koon inquiry, and as such, his sentence should be reversed. While the State recognizes that the record does not contain a detailed Koon inquiry, the record does establish that Robertson knowingly, intelligently, and voluntarily waived his right to present mitigating evidence and both Robertson and his counsel were aware of all available mitigation evidence. Accordingly, any

failure to follow the procedural requirements of Koon was harmless error. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

In the instant case, Robertson's trial counsel informed the court of the procedural requirements of Koon and Muhammad, and indicated that he had previously provided these cases to the court and counsel. Trial counsel informed the court of the obligation to discuss the waiver of mitigation and to consider all the mitigating evidence, and the trial judge responded, "I have, and I will." (V2:S69). Thereafter, the following exchange took place between the court and Robertson:

> COURT: . . . Pursuant to his sworn Affidavit, the defendant has waived the right to a trial, a penalty phase, presentation of mitigation evidence and a sentence hearing.
>
> Mr. Robertson, you are under oath and although it was addressed by [defense counsel], Mr. Robertson, do you waive your right to present mitigation evidence at this hearing, sir?
>
> DEFENDANT: Yes, your Honor.

(V2:S72). While the court did not conduct a detailed inquiry with Robertson and his counsel at this time regarding the waiver of mitigation, the court had earlier received Robertson's affidavit indicating the he was knowingly waiving the presentation of mitigating evidence because he wanted a death sentence. (V1:167-69). In his affidavit, Robertson indicated that he was waiving the presentation of all mitigating evidence

and had instructed his attorney not to hire an expert to investigate mitigation. Robertson acknowledged that he had been evaluated by two psychiatrists and was aware that the trial judge had to consider all mitigating evidence found in the record.

Contrary to the speculation in Appellant's Initial Brief, the record does not demonstrate that trial counsel latched onto Robertson's desires and failed to investigate mitigating evidence. Rather, the record reflects that trial counsel was aware of his obligations under Koon as he provided the case to the trial court. The record shows that all the parties, including Robertson, were aware of the available mitigation as they had obtained the multiple reports from Drs. Silver and Schaerf[9] and had reviewed the detailed PSI prior to sentencing. The mental health experts discussed Robertson's background in great detail in their reports and this information was contained in the PSI prepared by the Department of Corrections.

While the trial judge did not follow the procedural requirements of Koon and require that counsel detail the mitigating evidence which could be presented on the record and confirm that Robertson was knowingly waiving the presentation of

[9] Drs. Silver and Schaerf conducted sanity evaluations in 2011 (V1:22, 23), and competency evaluations in 2012 (V1:32, 37).

such evidence, the record establishes that Robertson was aware of this evidence and knowingly waived presenting *any* mitigation. In Chandler v. State, 702 So. 2d 186, 199 (Fla. 1997), this Court rejected the defendant's "hypertechnical interpretation" of Koon when he argued that he was entitled to a new penalty phase when the court accepted his waiver of the right to present penalty phase mitigating testimony and his counsel failed to inform the trial court "what that evidence would be." This Court stated that the primary reason for requiring the Koon procedure was "to ensure that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence. Only then could the trial court, and this Court, be assured that the defendant knowingly, intelligently, and voluntarily waived this substantial and important right to show the jury why the death penalty should not be imposed in his or her particular case." Id.

In the instant case, the record reflects that Robertson and his counsel were aware of the mitigating evidence available, but Robertson knowingly waived the presentation of any such evidence given his desire to receive a death sentence. Obviously, trial counsel had investigated and obtained mitigating evidence,

because if Robertson had not waived the presentation of this evidence, trial counsel could have easily presented the two mental health experts to testify regarding the mitigating information contained in their reports. This evidence consisted of a detailed background into his childhood, his prior criminal history, and his lack of any significant mental illnesses. Although the court did not require trial counsel to detail this mitigating evidence on the record or have the defendant confirm that his counsel has discussed these matters with him, any failure to follow Koon's procedural requirements is harmless beyond a reasonable doubt as Robertson's affidavits and statements clearly reflect that he was aware of, and knowingly waived, the presentation of mitigating evidence.

B. Alleged Deficiencies with the PSI

In Muhammad v. State, 782 So. 2d 343 (Fla. 2001), the defendant waived the presentation of all mitigating evidence before the jury and this Court reversed his sentence and remanded for resentencing because the trial judge gave great weight to the jury recommendation. Expressing concern that the defendant would again waive his right to present mitigating evidence, this Court set forth a policy requiring the preparation of a PSI in every case where the defendant does not

challenge the imposition of the death penalty and refuses to present mitigation evidence. Id. at 363-64. This Court stated:

> To be meaningful, the PSI should be comprehensive and should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background. In addition, the trial court could require the State to place in the record all evidence in its possession of a mitigating nature such as school records, military records, and medical records. Further, if the PSI and the accompanying records alert the trial court to the probability of significant mitigation, the trial court has the discretion to call persons with mitigating evidence as its own witnesses.

Id.

In the instant case, Appellant argues that the PSI prepared by Department of Corrections' (DOC) probation officer Michael Gottfried was not comprehensive and violated the dictates of Muhammad and Florida Rule of Criminal Procedure 3.710.[10] Appellant further asserts that the PSI was biased as Gottfried recommended that Robertson receive a death sentence. The State submits that Appellant failed to preserve this issue for appellate review and his claim is without merit.

[10] Following Muhammad, this Court amended Rule 3.710 and required the Department of Corrections to prepare a comprehensive PSI when the defendant refuses to present mitigating evidence. See Amendments to the Florida Rules of Criminal Procedure, 886 So. 2d 197 (Fla. 2004) (giving examples of things the PSI should include, such as, mental health problems, school records, and relevant family background).

Appellant first asserts that the PSI prepared by Gottfried "violated the neutrality expected" under Rule 3.710 because Gottfried worked for the Department of Corrections and the murder occurred in prison with an inmate victim and Robertson also had pending charges involving an attempted murder and attempted robbery against a correctional officer at the Charlotte County Jail. Appellant does not identify the requirement that the PSI be "unbiased," but implies that such is a requirement of Rule 3.710(b). Obviously, as the Department of Corrections is the only statutorily authorized agency allowed to prepare a PSI, there can be no method of avoiding situations where DOC prepares a PSI in cases involving crimes against law enforcement personnel or crimes committed by inmates while in DOC custody. Furthermore, section 921.131(1)(l) states that the PSI shall contain "[t]he views of the person preparing the report as to the offender's motivations and ambitions and an assessment of the offender's explanations for his or her criminal activity." In this case, DOC probation officer Gottfried complied with Florida statutory law by giving his views of Robertson's motivations and explanations for his criminal activity.

Appellant further complains that Gottfried recommended that Robertson be sentenced to death in violation of the Committee

Notes contained in Florida Rule of Criminal Procedure 3.710(b). While the committee notes in Rule 3.710 state that DOC "*should* not recommend a sentence" in the PSI when a defendant refuses to present mitigating evidence, Florida Statutes, section 921.131 mandates that the PSI contain a recommendation as to disposition by the court. See § 921.131(1)(o), Fla. Stat. (2012). In the PSI, Gottfried summed up the comprehensive PSI by stating:

> The Department of Corrections does believe in rehabilitation, but there are times when there is no hope for this to occur. We are now faced with an inmate who is incorrigible, unable to conform and is still dictating what he wants as an outcome of this sentencing.
>
> **The Department of Corrections recommends to the court that should this offender be found guilty of the murder of inmate Frank Richard Hart, that he be adjudicated and sentenced to death.** It should be noted that this recommendation is made in no way to reward this inmate by recommending the sentence that he so desperately wants. **It is merely a recommendation and it is up to the court to decide the fate of inmate James Robertson.**

(V1:37 at 12) (emphasis added).

Neither Robertson nor his counsel ever raised objections to the alleged deficiencies in the PSI and to Gottfried's recommendation after having reviewed the report.[11] In fact,

[11] While Robertson's appellate counsel argues that trial counsel was merely latching on to Robertson's desire to obtain a death sentence by failing to object, the State would note that defense counsel pointed out inaccuracies in the PSI to the trial judge, and also informed the court of the need to follow the procedures set forth in Koon and Muhammad. (V2:S7, S69).

Robertson's trial counsel purposefully elicited Gottfried's recommendation on cross-examination at the penalty phase. (V2:S50-53). Accordingly, Robertson has waived any objections to the PSI at this time based on his failure to object below. See McKenzie v. State, ___ So. 3d ____, 2014 WL 1491501 (Fla. Apr. 17, 2014) (stating that defendant waived any deficiencies with the PSI when he failed to inform the trial court that information was missing from the report); Barnes v. State, 29 So. 3d 1010, 1026 (Fla. 2010) (finding that defendant's complaint regarding the PSI was not preserved by objection below).

Even if this Court addresses Appellant's claim, the record establishes that the PSI was comprehensive and contained information regarding Robertson's prior mental history, school records, and relevant family background as required by Muhammad and Rule 3.710(b). The PSI chronicled Robertson's extensive history of criminal offenses, both as a juvenile and an adult. Robertson has been continuously incarcerated since 1980, and committed a number of offenses while incarcerated. (V1:37 at 5-7). The PSI noted that Robertson dropped out of junior high school while in the 8th grade, but he obtained his GED in 1982 when serving time at DeSoto Correctional Institution. (V1:37 at 7). The PSI noted that Robertson never failed at school, but was

in a few special classes. From first to third grade, he could not sit still and got into trouble. (V1:37 at 10-11). Regarding his family background, the PSI noted that Robertson grew up in an economically disadvantaged home with a physically abusive father. Further, Robertson's immediate and extended family had a history of alcohol and substance abuse. Robertson's father was deceased, his mother was elderly and had cancer, and he has two brothers, but has not had any contact with them in over twenty years. (V1:37 at 8-9). Officer Gottfried testified that he reviewed psychological reports in preparing the PSI and he noted that Robertson had first been prescribed medication for his depression during the late 1980s and early 1990s at Florida State Prison. Robertson also received medication for anxiety. In 2000, Robertson participated in anger management and individual therapy classes. Under the heading for alcohol and substance abuse, the PSI stated that Robertson was never a big alcohol consumer, and his substance of choice was marijuana as he used it daily as a teenager. (V1:37 at 10).

While Appellant argues that the report is incomprehensive because it does not contain Robertson's actual school and medical records, this argument is without merit. As this Court stated in Fitzpatrick v. State, 900 So. 2d 495, 524 (Fla. 2005), the failure of a PSI to contain the defendant's military records

was not reversible error as "[t]he rationale behind this Court requiring a comprehensive PSI is to allow the trial court to have before it all the available information regarding the defendant. The substance of the PSI, not the form, is what is important." In this case, Gottfried conducted an extensive investigation into Robertson's background and included this information in the PSI. As recognized in Fitzpatrick, the substance of the PSI was comprehensive and Gottfried was not required to physically attach all of the reports and documentation he reviewed to the PSI.

Finally, even if this Court were to determine that the PSI in this case was deficient or that DOC should not have recommended a sentence, any error is harmless. The trial judge was well-aware that any recommendation by DOC was not binding on the court, and as Gottfried stated in the PSI, "[i]t is merely a recommendation and it is up to the court to decide the fate of inmate James Robertson." Likewise, the court was aware of all of Robertson's potential mitigating evidence as the court had the PSI and four reports from Drs. Silver and Schaerf discussing Robertson's family and educational background, his mental health history, and his alcohol and substance usage.

C. Whether the trial judge had a precommitment to impose a death sentence and whether the court improperly considered Robertson's wishes in imposing the sentence?

Robertson's appellate counsel asserts that this Court should reverse his death sentence because the trial judge had a precommitment to sentence Robertson to death as evidenced by the fact that the sentencing order apparently was drafted prior to the plea/sentencing hearing. Pursuant to Florida Statutes, section 921.141(3), the trial judge must prepare a written sentencing order when imposing a death sentence prior to the oral pronouncement of sentence. § 921.141(3), Fla. Stat. (2012); see also Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988) (setting forth procedural rule that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement"), receded from on other grounds, Franqui v. State, 699 So. 2d 1312 (Fla. 1997). Here, the judge complied with this requirement and apparently prepared a written sentencing order, or at least a portion of it, prior to her oral pronouncement.[12]

While Appellant recognizes the requirement that the court prepare a written order prior to oral pronouncement, Robertson's appellate counsel argues that the court did not take sufficient

[12] The transcript of the plea/sentencing hearing indicates that the judge took an eleven minute recess between Robertson's plea and the imposition of the sentence. (V2:S69-70; 217). The State cannot speculate how much of the written order, if any, was drafted during the recess.

time to consider the matters that transpired prior to the sentencing hearing. As the record establishes, the court was given all the documentation and discovery to review prior to the plea/sentencing hearing, and thus, was aware that Robertson was entering into a guilty plea and waiving the presentation of all mitigating evidence. Prior to the recess, the court went through the plea colloquy with Robertson and he entered his guilty plea to first degree murder. The court then heard brief testimony from DOC correctional probation officer Michael Gottfried, testimony from Robertson that he had committed the prior offenses and had no remorse, and argument from the State regarding the aggravating circumstances and from Robertson's trial counsel that he agreed with the aggravators and stated that no statutory mitigators applied. After the brief recess, the court orally announced its sentence imposing death.[13]

In Spencer v. State, 615 So. 2d 688, 690 (Fla. 1993), this Court expressed concern that its prior decision in Grossman requiring written orders to be prepared prior to oral

[13] Robertson's trial counsel did not raise any objection to the court's oral pronouncement or the procedure utilized in rendering the sentence. See Happ v. Moore, 784 So. 2d 1091, 1102-03 (Fla. 2001) (rejecting ineffective assistance of counsel claim because trial counsel failed to preserve issue by objecting to court's oral pronouncement and procedure in imposing death sentence).

pronouncement of sentence "would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard." Accordingly, this Court set forth the following procedure to be used in the sentencing phase:

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. Such a process was clearly not followed during these proceedings.

Id. at 690-91. This Court stated in Happ v. Moore, 784 So. 2d 1091, 1103 n.12 (Fla. 2001), that "[t]he obvious import of our decisions in Grossman and Spencer was to ensure that trial judges take the time to consider all relevant circumstances and arrive at an informed decision uninfluenced by haste and initial impressions."

In the instant case, the court had ample time to consider all the relevant circumstances before imposing the sentence as

she had received all the pertinent documents before the hearing and was aware of all of the aggravating and mitigating factors. This is not a case where the judge was precommitted or predisposed to impose a death sentence, but rather, the court carefully considered all the aggravating and mitigating circumstances and imposed a death sentence because the aggravating circumstances clearly outweighed the mitigation. As no prejudicial error occurred in this case based on the court's procedures, this Court should affirm the death sentence.

Appellant further argues that the court improperly considered Robertson's desire to receive a death sentence when imposing the sentence. At the outset of the court's sentencing order, the trial judge stated:

> (A) DEFENDANT'S WISHES AND INTENT:
>
> Defendant has repeatedly expressed his wish to enter a plea of guilty to first degree murder, with the intention of receiving a sentence of death. At first appearance on June 11, 2009, Defendant stated that the charge should be first degree murder rather than second degree murder, because it was premeditated. Defendant stated in his October 19, 2012 affidavit that he wanted to plead guilty to first degree murder and receive a death sentence. He reiterated these statements to Dr. Silver according to Dr. Silver's October 19, 2012 report, and to Dr. Schaerf in Dr. Schaerf's report following his evaluation of defendant on November 2, 2012. The Pre-Sentence Investigation (PSI) report references a forensic psychiatric evaluation of Defendant on October 19, 2011, where Defendant indicated he had been "thinking about how to go to death row" since 2008. In his recorded statement taken on October 19,

> 2012, Defendant indicated he had been thinking about how to get the death penalty since July 2008, and after murdering his cellmate, when he realized he was being charged with second degree murder, he wrote to five individuals in the State Attorney's Office in 2009 indicating the murder was premeditated and requesting the death penalty. In the recorded statement, Defendant told the investigators that if he did not receive the death penalty, he would continue to kill until he received it. Accordingly, the Court assigns great weight to the Defendant's wishes and intent.

(V2:219-20). Subsequently, when discussing the weighing of the aggravating and mitigating circumstances, the court again noted that it was giving great weight to Robertson's wish and intent to be put to death. (V2:225).

It is well established that "[t]he only matters that may be considered in aggravation are those set out in the death penalty statute." Zack v. State, 911 So. 2d 1190, 1208 (Fla. 2005). This Court has previously stated that it must "guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Miller v. State, 373 So. 2d 882, 885 (Fla. 1979). While the State questions whether the trial judge considered Robertson's desire to receive the death penalty as an "aggravating" factor,[14]

[14] As the motivation for the murder was Robertson's desire to obtain a death sentence, and the procedural aspect of the case was shaped largely by Robertson's desires, the trial court obviously had to discuss Robertson's intent when discussing the background of his case.

it is clear that the judge stated that she gave Robertson's intent and wishes "great weight." This fact, however, is not dispositive, as this Court applies the harmless error analysis when a trial court improperly considers a nonstatutory aggravator. See Zack, supra; Eaglin v. State, 19 So. 3d 935, 946-47 (Fla. 2009) (holding that trial judge's reference to defendant's lack of remorse in sentencing order was harmless error and did not require resentencing). Here, there is no question that the trial judge would have sentenced Robertson to death even without giving weight to his wishes as this is a case involving an inmate who has a lengthy history of committing violent crimes while in custody, and the instant murder was committed in a cold, calculated, and premeditated manner and was especially heinous, atrocious, or cruel.[15] There is no reasonable doubt that Robertson's minimal mitigation of depression, substance abuse, and a poor and abusive family background does not outweigh the substantial aggravation. Accordingly, this Court should find that any error in considering Robertson's wishes was harmless error.

[15] This Court has previously stated that the CCP and HAC aggravators are two of the weightiest aggravators in Florida's statutory scheme. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999).

D. The court did not abuse its discretion by failing to appoint special counsel to investigate and present mitigation evidence

Appellant argues that the trial court abused its discretion by failing to, *sua sponte*, appoint special counsel to investigate and present mitigation evidence against Robertson's wishes. In Muhammad v. State, 782 So. 2d 343, 363-64 (Fla. 2001), this Court stated that when a defendant waives the presentation of mitigation, the trial court must order the preparation of a comprehensive PSI, and if the PSI and other information alerts the trial court to the probability of significant mitigation, the 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 use standby counsel for this limited purpose." See also Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988) (holding that there was no error in not appointing counsel against Hamblen's wishes to investigate and present mitigation evidence and argue against the death sentence as "[t]he trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly").

In the instant case, the trial court did not abuse its discretion in failing to appoint special counsel to investigate mitigation. "Discretion is abused only 'when the judicial action

is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court.'" Ocha v. State, 826 So. 2d 956, 963 (Fla. 2002) (quotation and citations omitted). In this case, Robertson had counsel representing him, and although Robertson had requested that counsel not investigate mitigation, the record does not support appellate counsel's speculative assertion that counsel blindly complied with Robertson's request. Rather, the record shows that when trial counsel was appointed in Robertson's case, he was provided with all discovery including two mental health experts' reports discussing Robertson's sanity. Thereafter, counsel sought a competency determination and the two mental health experts provided two more detailed reports to counsel discussing Robertson's background and mental health.[16] In addition, based on the court's actions in following Muhammad, trial counsel obtained and reviewed a comprehensive PSI prior to sentencing.

In Farr v. State, 656 So. 2d 448, 450 (Fla. 1995), this Court refused to recede from Hamblen and held that "there is no constitutional requirement" that special counsel be appointed to

[16] Drs. Silver and Schaerf provided reports following the sanity evaluation in 2011, and then re-examined Robertson one year later for competency to enter into his plea and waive mitigation.

present mitigation when the defendant is not challenging the imposition of a death sentence as was done in Klokoc. This Court noted that "[w]hile trial courts have discretion to appoint special counsel where it may be deemed necessary, there is no error in refusing to do so." Id.; see also Ocha, supra; Durocher v. State, 604 So. 2d 810 (Fla. 1992) (rejecting defendant's claim that special counsel should have been appointed as was done in Klokoc because neither the defendant or his counsel requested such appointment); Boyd v. State, 910 So. 2d 167, 189 (Fla. 2005) (holding that whether a defendant is *pro se* or represented by counsel, he has the right to choose what evidence, if any, he will present in mitigation). Here, where the trial court ensured that Robertson was knowingly, intelligently, and voluntarily waiving the presentation of mitigating evidence and the record establishes that Robertson and the court were aware of all available mitigation, there is no abuse of the court's discretion in failing to, *sua sponte*, appoint special counsel to investigate and present mitigation against Robertson's wishes. Accordingly, this Court should reject the instant claim and affirm the lower court's judgment and sentence.

SUPPLEMENTAL ISSUE

APPELLANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED INTO A GUILTY PLEA AND HIS DEATH SENTENCE IS PROPORTIONATE.

Although not raised on appeal by Robertson's appellate counsel, the State will briefly address the validity of his guilty plea and the proportionality of his death sentence. As this Court recently stated in McCoy v. State, 132 So. 3d 756, 765 (Fla. 2013), even when the defendant does not challenge his conviction for first degree murder, this Court has a mandatory obligation to review the basis for the conviction and determine that the plea was voluntary.

In this case, the plea colloquy clearly establishes that Robertson knowingly, intelligently, and voluntarily entered into a guilty plea. At the plea hearing, the parties stipulated to a number of matters regarding the details of the murder and Robertson's decision to plead guilty. The court accepted a detailed affidavit signed by Robertson explaining his legal rights and waiver of those rights, a transcript of his videotaped statement detailing the facts of the murder, the medical examiner's autopsy report, and the evaluations of the two mental health experts finding Robertson competent for the plea and sentencing. The court also conducted a colloquy with Robertson and he affirmed that he had reviewed the plea form

with his attorney and was entering the guilty plea knowing that he had two sentencing options; life in prison or a death sentence. (V2:S1-36). Because the record establishes that Robertson's plea was knowing, intelligent, and voluntary, this Court should affirm his conviction for first degree murder.

In addition to affirming Appellant's conviction for murder, this Court should also affirm his death sentence based on a finding that his sentence is proportionate. This Court has previously noted that it has an independent obligation to perform proportionality review in all death cases.

> Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. This review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. It is not a comparison between the number of aggravating and mitigating circumstances; rather, it is a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases.

McCoy v. State, 853 So. 2d 396, 408 (Fla. 2003) (quotation marks and citations omitted). This Court compares the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

A review of the aggravating and mitigating evidence established in the instant case demonstrates the proportionality of the death sentence imposed. In this case, the court found four aggravating factors applicable to the murder: (1) Appellant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the murder was committed by a person previously convicted of a felony and under a sentence of imprisonment; (3) the murder was especially heinous, atrocious, or cruel; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court found the statutory mitigating factor that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance based on Robertson's self-reported statement of depression over being incarcerated, and also found the following nonstatutory mitigators: (a) from a genetic perspective, Defendant's father, mother, maternal aunt, paternal uncle, grandmother and grandfather were alcoholics or substance abusers; (b) in early childhood, Defendant was very hyper; (c) Defendant's poor family background of poverty, substance abuse and violence; (d) Defendant has a background of substance abuse and criminal history, has been in custody continuously since 1980; Defendant has never had a job, a

meaningful relationship, or a normal life; and (e) Defendant obtained his GED in 1982 while in prison.

This Court has previously held that the HAC and CCP aggravators are two of "the most serious aggravators set out in the statutory sentencing scheme." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Here, Appellant, an incarcerated inmate with a lengthy criminal record, purposefully strangled to death his conscious cellmate in order to receive the death penalty. The weighty aggravating factors far outweighed the mitigation presented in this case and establish that Appellant's death sentence is proportionate. See, e.g., Cox v. State, 819 So. 2d 705 (Fla. 2002) (death sentence proportional where inmate murdered another inmate in prison and the same four aggravating circumstances were present as in the instant case); Eaglin v. State, 19 So. 3d 935 (Fla. 2009) (upholding death sentence for inmate serving a life sentence who murdered a prison guard during an escape attempt); Smith v. State, 998 So. 2d 516 (Fla. 2008) (same – Eaglin's codefendant). Because Appellant's death sentence is proportionate based on the significant aggravating factors and slight mitigation in this case, this Court should affirm Appellant's conviction and death sentence.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's judgment and conviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to **Julius Aulisio**, Assistant Public Defender, Public Defender's Office, Tenth Judicial Circuit, P.O. Box 9000 — Drawer PD, Bartow, Florida 33831-9000 [**appealfilings@pd10.state.fl.us**], [**jaulisio@pd10.state.fl.us**], on this 3rd day of December, 2014.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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