APPENDIX G

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **CASE NO. 04-CF-12631**

CHARLES GROVER BRANT,

Defendant.

_____/

SUCCESSIVE MOTION PURSUANT TO FLA. R. CRIM. PRO. 3.851 TO VACATE SENTENCE OF DEATH

CHARLES GROVER BRANT, Defendant in the above-captioned action, respectfully moves this Court for an Order, pursuant to Fla. R. Crim. P. 3.851, vacating and setting aside the sentence of death, imposed upon him by this Court. In support thereof, Mr. Brant, through counsel, respectfully submits as follows:

PROCEDURAL HISTORY

The Honorable William Fuente, Circuit Judge, Thirteenth Judicial Circuit, Hillsborough County, entered the judgments of conviction and sentence under consideration. (Attachment A).

Mr. Brant was charged by indictment on July 14, 2004 with one count of first degree premeditated murder, one count of sexual battery, one count of kidnapping, one count of grand theft of a motor vehicle, and one count of burglary of a dwelling for the murder of Sara Radfar on July 2, 2004.

Upon advice of counsel, Mr. Brant pled guilty to all charges on May 25, 2007. On August 13, 2007, the trial court adjudicated Mr. Brant guilty of all charges. The penalty phase began with jury selection on August 20, 2007. On August 22, 2007, Mr. Brant waived his right to a penalty phase jury. The trial court conducted a bench trial on August 22-24, 2007. The trial court sentenced Mr. Brant to death on count one. The court found the following aggravators and gave both great weight: (1) the murder was committed during the course of a sexual battery and, (2) the murder was especially heinous, atrocious and cruel (HAC).

The court found the following mitigating circumstances; (1) no significant prior criminal activity/little weight; (2) emotional, mental, and physical abuse during childhood, diminished intellectual function, diminished impulse control due to drug dependency, and as a result, his capacity to conform his conduct to the law was substantially impaired, and sexual obsessive disorder/moderate weight; (3) age of 39 at the time of the crime and a crime free life until the time of the crime/little weight; (4) remorse/little weight; (5) cooperation with law enforcement, confession, guilty plea, and waiver of jury penalty recommendation/moderate weight; (6) borderline verbal intelligence/little weight; (7) family history of mental illness/little weight; (8) not a sociopath or psychopath and does not have an anti-social personality disorder/little weight; (9) diminished impulse control due to methamphetamine abuse and exhibition of periods of psychosis, recognizing drug problem and seeking help, and methamphetamine use before, during, and after the crimes/moderate weight; (10) diagnosed with chemical dependence and sexual obsessive disorder, and has symptoms of attention deficit disorder/moderate weight; (11) good

father/little weight; (12) good worker and craftsmen/little weight; (13) reputation for non-violence/little weight.

Mr. Brant filed a timely motion for post- conviction relief which he amended several times. In his final amended motion, Brant raised seven claims: (1) ineffective assistance of counsel during the guilt phase; (2) ineffective assistance of counsel during the penalty phase; (3) counsel was ineffective for failing to prepare for jury selection; (4) counsel was ineffective for failing to present the testimony of a neuropharmacologist on the issue of the interrogation's effect on Brant; (5) cumulative ineffective assistance; (6) Brant will be incompetent at the time of execution; and (7) the State withheld evidence that Brant's half-brother was a confidential informant in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brant v. State,* 197 So. 3d 1051, 1063 (Fla. 2016). Brant ultimately withdrew Claim Four. *Id.*

The post-conviction court denied his Motion. Mr. Brant timely appealed raising claims: 1) trial counsel were ineffective for advising him to plead guilty without consulting a jury expert or researching jury decision-making, and without Brant receiving any benefit for his plea; 2) trial counsel rendered ineffective assistance during the penalty phase by failing to conduct a reasonable mitigation investigation, consult with an expert on methamphetamine, consult with and present positive prison adjustment testimony, and present images from Brant's PET scan and additional experts to describe the findings from the PET scan, and conduct an adequate background and mental health investigation; 3) failure to conduct an adequate investigation and thereby render deficient performance by advising Brant to waive a penalty phase jury, or, failing to advise him at all thereby effectively abandoning him; 4) State violated *Brady*; and, 5) appellate counsel failed to

appeal the denial of Brants' motion to dismiss the kidnapping charge and challenge the Florida Supreme Court's proportionality review.

While Mr. Brants' appeal of this Court's Order was pending at the Florida Supreme Court, the Supreme Court of the United States issued *Hurst v. Florida*. Mr. Brant timely sought supplemental briefing before the Florida Supreme Court, which the court granted. Ultimately, the court denied all of Mr. Brants' claims, including his claim that his sentence of death was unconstitutional under the Sixth Amendment in light of *Hurst*. *Brant v. State,* 197 So. 3d 1051, 1063 (Fla. 2016). Mr. Brant timely filed a Petition for Writ of Habeas Corpus in the federal District Court for the Middle District of Florida, *Brant v. Jones, et al.*, Case No: 8:16-cv-2601-T-23-MAP. That case remains pending and has been administratively closed pending exhaustion of Mr. Brant's *Hurst* claims.

(A) JUDGMENT AND SENTENCE UNDER ATTACK

Mr. Brant was convicted of one count of first degree murder, one count of sexual battery, one count of kidnapping, one count of grand theft of a motor vehicle, and one count of burglary of a dwelling. Mr. Brant was sentenced to death on the first degree murder charge; he was sentenced to concurrent life sentences for sexual battery, kidnapping, and burglary of a dwelling; he was sentenced to five years in prison for grand theft of a motor vehicle. A copy of the judgment and sentence is attached to this motion as Exhibit A

(B) PRIOR ISSUES RAISED AND DEPOSITION ON APPEAL

The following issues were raised in Mr. Brant's direct appeal:

1. Whether Mr. Brant's death sentence was proportionate. This claim was denied.
2. Whether Mr. Brants' guilty pleas were given knowingly, intelligently, and voluntarily.

This claim was raised sua sponte by the Florida Supreme Court, but ultimately denied.

The following claims were raised in Mr. Brant's initial motion for post-conviction relief pursuant to Fla. R. Crim. Pro. 3.851:

1. Ineffective Assistance of Counsel . Guilt Phase (Jury expert/Garrett Coleman C.I.) . denied.
2. Ineffective assistance of Counsel – Penalty Phase (failure to conduct reasonable mitigation investigation: brain damage, multi-generational family-history, community and parenting risk factors, adapt to prison, sexual homicide risk factors, neur-imaging, psychopharmacologist, Garrett Coleman's CI status) – denied.
3. Ineffective Assistance of Counsel- Waiver of penalty phase jury, failure to inform about extent of mitigation therefore waiver not knowing – denied.
4. Ineffective Assistance of Counsel- Supression of Confession- failure to consult with a psychopharmacologist – withdrawn.

5. Cumulative Error – denied.
6. Prosecution withheld Brady evidence/ Giglio violation (Garrett Coleman CI status) - – denied..

Mr. Brant raised the following issues on direct appeal of the denial of his post-conviction motion:

1. Counsel was ineffective in failing to research jury decision-making and thus misadvising Brant to enter a guilty plea based on an uninformed belief that by pleading guilty, Brant was less likely to incur the jury's anger. Counsel was further deficient in failing to investigate mitigation prior to advising Brant to enter a plea. But for counsel's deficient performance, Brant would not have pled guilty.
2. Counsel rendered ineffective assistance in the penalty phase by failing to investigate and present mitigation which prejudiced Brant.
3. Counsel's performance in failing to investigate and prepare for jury selection and develop and inform Mr. Brant of mitigation in the penalty phase fell below prevailing professional norms. But for counsel's deficient performance, Mr. Brant would have exercised his right to a sentencing phase jury.
4. The State violated Brady v. Maryland in failing to disclose Garret Coleman's status as a CI at trial. Further, Brant was denied a full and fair hearing on this claim when the state continued to refuse to disclose evidence which would have substantiated Garret's status as a CI.

5. Cumulative Error.
6. Brant's Eighth Amendment right against cruel and unusual Punishment will be violated as Brant may be incompetent at the time of execution.
7. Following the Issuance of *Hurst v. Florida,* — U.S. ——, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016) , Mr. Brant sought supplemental briefing arguing that his sentence of death had been unconstitutionally obtained in violation of the Sixth Amendment and that Section 775.082, Florida Statutes, Mandates a Life Sentence Following *Hurst.* 5

The Florida Supreme Court rejected all of Mr. Brant's claims, including a finding that *Hurst* does not apply to death sentences where the defendant waived a jury. *Brant v. State,* 197 So. 3d 1051 (Fla. 2016).

Reasons Claims Listed Below were not Previously Raised

On the basis of the new Florida law arising from *Mosley v. State, Bevel v. State, Hurst v. State*, and the enactment of Chapter 2017-1, Brant files this successive motion to vacate and presents his claims for relief arising from the resulting new Florida law. On January 12, 2016, *Hurst v. Florida*, 136 S. Ct. 616 (2016), issued. The decision declared Florida's capital sentencing scheme unconstitutional. On March 7, 2016, Chapter 2016-13 was enacted. It was the legislature's first effort to rewrite Fla. Stat. § 921.141 in attempt to cure the constitutional deficiencies.

On October 14, 2016, the Florida Supreme Court ("FSC") issued its decision in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, the FSC concluded that the Sixth **and the Eighth Amendments** required a unanimous jury verdict recommending a death sentence before one could be imposed. As the FSC explained in *Hurst*, "Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate

decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses." *Hurst v. State*, 202 So. 3d 40, 72 (Fla. 2016) (internal citations omitted). Accordingly, the jury must unanimously find that sufficient aggravators exist to justify a death sentence and that the aggravators outweigh the mitigating factors present in the case. Finally, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful, even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst*, 202 So. 3d at 59 ("'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'") *See also Hurst*, 202 So.3d at 62, n. 18.

On December 22, 2016, the FSC decided *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). After conducting a *Witt*[1] and *James*[2] analysis, the Court decided that Mosley was entitled to the retroactive effect of *Hurst* and the error was not harmless. Therefore, Mosley's death sentence was vacated and he was entitled to a new penalty phase. *Id.* at 1284.

On March 13, 2017, Chapter 2017-1 was enacted, which finally created a constitutional capital sentencing scheme in Florida. Florida law further evolved on June 15, 2017 when the Florida Supreme Court decided *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017). Bevel's conviction

---

[1] *Witt v. State*, 387 So.2d 922 (Fla. 1980).
[2] *James v. State*, 615 So.2d 668 (Fla. 1993).

became final after *Ring*[3], therefore Bevel was entitled to retroactive *Hurst* relief. *Id.* at 1175. Further, *Bevel* acknowledges that *Hurst* has affected the prejudice analysis of *Strickland*[4] claims. *See id.* at 1179. Although Bevel's jury recommendation was unanimous, his death sentence was vacated because the "unpresented evidence of substantial mitigation" could have swayed one juror, which "would have made a critical difference." *Id.*

This successive motion is filed within one year of the issuance of *Mosley v. State, Bevel v. State,* and the enactment of Chapter 2017-1, all of which have established new Florida law. The claims below could not have been raised previously because these claims arise from changes in Florida law caused by these opinions and the statutory amendment. These claims were not ripe until now because their basis did not exist before these changes in Florida law. Accordingly, this motion is timely.

(C) NATURE OF RELIEF SOUGHT

Mr. Brant respectfully asks that his sentence of death be vacated.

(D) CLAIMS FOR WHICH AN EVIDENTIARY HEARING IS SOUGHT.

CLAIM 1

MR. BRANT COULD NOT KNOWINGLY HAVE WAIVED HIS RIGHTS TO A UNANIMOUS JURY VERDICT BECAUSE THAT RIGHT DID NOT YET EXIST. THEREFORE, HIS JURY WAIVER WAS NOT KNOWING AND VOLUNTARY AND WAS OBTAINED IN VIOLATION OF MR. BRANTS' FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES' CONSTITUTION AND HIS

---

[3] *Ring v. Arizona*, 536 U.S. 584 (2002).
[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION, .

This claim is evidenced by the following:

1. All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specified reference.

2. Mr. Brant acknowledges that the Florida Supreme Court has held that capital defendants who waived their right to a penalty phase jury are not entitled to Hurst relief. *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). However, this Court should not deny Mr. Brant's motion based on *Mullens*, because Mr. Brant has substantial arguments not previously raised in his own case at the Florida supreme Court and not considered in *Mullens*.

3. A defendant cannot waive a right not yet recognized by the courts. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Management Health Systems, Inc. v. Access Therapies, Inc.*, No. 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) ("It is axiomatic that a party cannot waive a right that it does not yet have.") *Cru` . . Lowes` Home Centers, Inc.*, No. 8:09-cv-1030-T-30MAP, 2009 WL 2180489, at *3 (M.D. Fla. Jul. 21, 2009) (same); *cf. Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not "inevitably waive all antecedent constitutional violations" and a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established").

4. In *Halbert*, the United States Supreme Court held that where the appellate court considers the merits of the claim in ruling on a motion for leave to appeal, a defendant has a constitutional right to appointed counsel in filing the motion for leave to appeal. 545 U.S. at 618-19. Michigan argued that even if the defendant had a constitutional right to appointed counsel he

had waived that right when he pled *nolo contendere*. *Id.* at 623. The Supreme Court found, however, that the defendant did not waive his right to counsel because he "had no recognized right to appointed appellate counsel he could elect to forgo." *Id.*

5. The holding of *Mullens* is contrary to *Halbert*. *Mullens* holds that there is no *Hurst* error where the defendant waived a jury recommendation at sentencing. *Mullens*, 197 So. 3d at 39. Prior to *Hurst*, however, a Florida defendant could not have waived *Hurst*-required jury factfinding because that right was not yet recognized by the courts, nor could he have waived his right to a unanimous jury verdict under the Eighth Amendment because that right did not yet exist in Florida.. The pre-*Hurst* defendant could only waive the right to a jury recommendation of life or death.

6. At the time of Defendant's death sentencing proceeding, before *Hurst*, Florida's unconstitutional capital-sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a death sentence. Defendant, therefore, waived only the right to a jury recommendation, not to his then-unrecognized Eighth Amendment constitutional right to a unanimous jury fact-finding prior to the imposition of a sentence of death. Under *Halbert*, Defendant could not have waived his right to jury fact-finding or a unanimous jury verdict.

7. Even if this Court concludes that a pre-*Hurst* defendant could waive *Hurst* relief, Defendant's waiver was not knowing, voluntary, and intelligent, *Mullens*, 197 So. 3d at 39(waiver of jury sentencing must be "knowingly, voluntarily, and intelligently made"); *Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010) (waiver of post-conviction counsel and post-conviction proceedings must be "knowing, intelligent, and voluntary"), because it did not consider the possibility that

Florida's death-sentencing scheme would be found unconstitutional, *see Rodgers v. Jones*, 3:15-cv-507-RH, ECF No. 15 (N.D. Fla. Aug. 24, 2016) (federal district court order noting Defendant's waiver was pre-*Hurst* and did not address "the possibility that the entire Florida sentencing scheme would be held unconstitutional").

7. Mr. Brant pled guilty to first degree murder. After one attempt to secure a jury for the sentencing phase of his trial which resulted in a "debacle," Mr. Brant opted to waive his right to a non-unanimous jury recommendation.

8. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. The Sixth Amendment right enunciated in *Hurst v. Florida*, and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a death sentence must be found by a jury beyond a reasonable doubt, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst*, 136 S. Ct. at 621. *Hurst v. Florida* held that "Florida's capital sentencing scheme violates the Sixth Amendment . . . ." It invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition of a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. *Hurst*, 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these

facts." *Id.* at 622. On remand, the Florida Supreme Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst*, 202 So. 3d at 57.

"*Hurst* applies retroactively to defendants whose sentences became final after the United States Supreme Court issued its decision in *Ring*." *Peterson v. State*, 221 So. 3d 571, 585 (Fla. 2017). Brant's sentence became final on February 10, 2009, when the time for filing a petition for writ of certiorari had expired. Therefore, Brant is clearly entitled to the retroactive application of *Hurst* and *Perry*. Where a constitutional rule is substantive, the Supremacy Clause of the United States Constitution requires a state postconviction court to apply it retroactively. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016).

In *Hurst v. State*, the court announced not one, but two substantive constitutional rules. *First*, the court held that the Sixth Amendment requires that a jury decide whether aggravating factors that have been proven beyond a reasonable doubt are sufficient in themselves to warrant the death penalty and, if so, whether those factors outweigh the mitigating circumstances. *Hurst*, 202 So. 3d at 53. *Second*, the court determined that the Eighth Amendment required that a jury unanimously determine that the evidence presented at the penalty phase warrants imposition of a death sentence. *Id.* at 62.

In *Hurst v. State*, the court stated that error under *Hurst v. Florida* "is harmless only if there is no reasonable possibility that the error contributed to the sentence." *Hurst*, 202 So. 3d at 68.

Moreover, "'the harmless error test is to be rigorously applied,'" and "the State bears an extremely heavy burden in cases involving constitutional error." *Id.* (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1137 (Fla. 1986)). Therefore, as to *Hurst* error, "the burden is on the State, as beneficiary of the error, to prove *beyond a reasonable doubt* that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant]'s death sentence in this case." *Id.* at 68 (emphasis added).

Brant asserts unequivocally that the *Hurst* error is not harmless in his case and any decision to the contrary is a violation of his rights. Brant recognizes that *Mullens v. State*, 17 So. 3d 745 (Fla. 2016), suggests defendants who waived a jury are not entitled to *Hurst* relief under the Sixth Amendment, and that he has previously raised that claim. However, no court has yet addressed Brant's argument that he could not have knowingly waived his Eighth Amendment right to a unanimous fact—finding jury, since that right did not yet exist.

Specifically, our highest Court held that a waiver of a constitutional right must be "knowingly and intelligently" relinquished. *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S.Ct., at 1023. *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Therefore, a waiver of rights that does not exist and is thus less than knowing cannot withstand constitutional scrutiny. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005).

Anything less than *Hurst* relief for all post-*Ring* defendants leads to disparate treatment among Florida capital defendants. Ensuring uniformity and fairness in circumstances in Florida's application of the death penalty requires full retroactive application of *Hurst* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed

in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . " *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). The FSC has granted *Hurst* relief in many cases that were more egregious than Brant's. *See e.g., Cole v. State*, 221 So. 3d 534 (Fla. 2017) (two victims buried alive and seven aggravating factors found); *Calloway v. State,* 210 So. 3d 1160 (Fla. 2017) (five men were shot in the head execution style and six aggravating factors found); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (three counts of first-degree murder where one of the victims was a law enforcement officer and five aggravating factors found); *Bradley v. State*, 214 So. 3d 648 (Fla. 2017) (murder of Brevard County Sheriff's Deputy, Barbara Pill, and five aggravating factors found); *Pasha v. State,* 42 Fla. L. Weekly S569 (Fla. May 11, 2017) (defendant murdered his wife and another victim by cutting their throats and four aggravating factors found); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (defendant was convicted of the kidnapping, robbery, and first degree murder of an 81 year old woman and the jury unanimously found four out of five aggravating factors on a special verdict form); *Davis v. State*, 217 So. 3d 1006 (Fla. 2017) (two counts of first-degree murder, five aggravating factors found for one murder and three for the other); *Snelgrove v. State*, 217 So. 3d 992 (Fla. 2017) (elderly couple brutally beaten and stabbed to death and five aggravating factors found); and *Hertz v. Jones,* 218 So. 3d 428 (Fla. 2017) (two counts of first-degree murder and six aggravating factors found). As all of these cases were more aggravated and exhibit facts that are more heinous, the only way to distinguish Brant's is that he waived his right to a jury.

However, Brant's situation is unique and an individualized harmless error review will show

that the *Hurst* error was not harmless. Particularly in light of the compelling mitigation presented in post-conviction. There is no doubt that Brant himself would not have waived his right to a jury and a properly instructed jury would not have unanimously returned a death recommendation in light of the overwhelming mitigation presented in post-conviction.

In the wake of *Hurst v. Florida* and the resulting new Florida law, any new Florida jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) must be correctly instructed as to its sentencing responsibility. Individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry*, 210 So. 3d 630. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed because the jury's sense of responsibility was inaccurately diminished in *Caldwell,* the USSC held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *See Caldwell*, 472 U.S. at 341.

It is likely that at least one juror would not join a death recommendation if Brant was granted a resentencing in front of a jury because the proper *Caldwell* instructions would be required. The probability of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation, and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *See Caldwell*, 472 U.S. at 330 ("In the capital

sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). Where the jurors' sense of responsibility for a death sentence is not explained or is diminished, a jury's verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

Furthermore, society's evolving standards of decency demand that Brant be granted *Hurst* relief, as the jury vote has evolved from a bare majority, to ten-to-two, to unanimous. In *Hurst*, the FSC ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed." 202 So. 3d at 61. Quoting the USSC, the Court in *Hurst* noted "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" 202 So. 3d at 61 (quoting *Atkins v. Virginia,* 536 U.S. 304, 312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 331, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)). Then from a review of the capital sentencing laws throughout the United States, the FSC in *Hurst* found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

202 So. 3d at 61. Accordingly, the Court in *Hurst* concluded:

> the United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

202 So. 3d at 63. *See Hurst*, 202 So. 3d at 73 (Pariente, J., concurring); *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016).

A capital defendant's life no longer lies in the hands of a judge or a bare majority; it lies in the hands of twelve individuals. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972)). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase jury has voted unanimously in favor of the imposition of death. The USSC has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in favor a life sentence, cannot be executed under the Eighth

Amendment. Therefore, Brant must be granted relief and the opportunity to make a constitutional decision regarding his waiver of a constitutional jury sentencing. It is arbitrary that a defendant who was convicted of triple murders with an eleven-to-one vote receives relief, while Brant is denied the same opportunity. *See Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any *Ring*- or *Hurst v. Florida*-related error is harmless." *Id.* "We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*." *Id.*). To find that the *Hurst* error was harmless and deny this right to Brant would be manifest injustice and a violation of his equal protection rights. *See* U.S. Const. amend. XIV.

I. Conclusion

Notwithstanding the insufficient colloquy, Brant cannot waive a constitutional right that did not yet exist under Florida law but that should have been afforded to him and every capital defendant. Now that a unanimous jury is required under the Eighth Amendment to sentence a defendant to death, the conversations and assessments between counsel and capital defendants change dramatically. Moreover, the colloquy required by a court in cases of waivers will also evolve. *Hurst* impacts an attorney's strategy and decision-making throughout the trial, including the decision whether to waive a penalty phase jury. No longer will the jury's role in determining death-eligibility be advisory; the jury will make the ultimate decision of whether the defendant's life will be spared. The new constitutional statute changes the harmlessness analysis because the landscape of *voir dire* and death qualification, pre-trial motions, opening and closing arguments,

investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments.

As the FSC explained in *Hurst v. State*, all of the findings necessary for the imposition of a death sentence must be unanimously found by the jury:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

Hurst, 202 So. 3d at 57-58. Lynch never had the constitutional benefit of the option of a penalty phase jury returning a verdict making findings of fact. There is no way of knowing what aggravators, if any, a jury unanimously could have found proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Further, each individual juror would be instructed that they individually carried the immense responsibility of whether a death sentence was authorized or a life sentence was mandated. The jurors would be told that they each were authorized to preclude a death sentence simply to be merciful. These are all important considerations for a conversation regarding

waiving a jury. Reviewing courts cannot speculate as to what the findings or vote would be if Brant was allowed a constitutional jury sentencing.

Brant requests that this Court vacate his sentences of death and order a new penalty phase proceeding.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mr. Brant requests the following relief, based on his prima facie allegations showing violation of his constitutional rights: 1) a "fair opportunity" to demonstrate that his death sentence stands in violation of the Fifth, Eighth and Fourteenth Amendments, *Hurst v. Florida*, *Mosley v. State*, *Bevel v. State*, and Chapter 2017-1; 2) a reevaluation of his previously presented *Strickland*, *Brady*, *Giglio*, and newly discovered evidence claims in light of the new Florida law that would govern at a resentencing in order to enhance the reliability of any resulting death sentence; 3) an opportunity for further evidentiary development to the extent necessary; 4) leave to supplement this motion should new claims, facts, or legal precedent become available to counsel; and 5) on the basis of the reasons presented herein, Rule 3.851 relief vacating Brant's sentence of death and granting a penalty phase proceeding, or, in the alternative, the imposition of life sentences.

Respectfully Submitted,

/s/ Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Florida Bar Number 0005584
Email: marie@samuelsparmerlaw.com
Samuels Parmer Law Firm, P.A.
P.O. Box 18988
Tampa, Florida 33679

Tel: (813) 732-3321
Fax: (813) 831-0061

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851(e)

Pursuant to Fla. R. Crim. P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel certifies that the contents of this successive motion have been discussed fully with Charles Grover Brant, that undersigned counsel has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this successive motion is filed in good faith.

/s/ Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Florida Bar Number 0005584
Email: marie@samuelsparmerlaw.com
Samuels Parmer Law Firm, P.A.
P.O. Box 18988
Tampa, Florida 33679
Tel: (813) 732-3321
Fax: (813) 831-0061

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was filed using the Florida Courts efiling Portal which has electronically served the Office of the Attorney General, capapp@myfloridalegal.com; Ron Gale, Assistant State Attorney, mailprocessingstaff@sao13th.com , and the Honorable Michelle Sisco, Circuit Court Judge, siscodm@fljud13.org, on this 21st day of December, 2017.

/s/Marie-Louise Samuels-Parmer
MARIE-LOUISE SAMUELS-PARMER
Fla. Bar No. 0005584

Copies provided by U.S. Mail to:

Charles Brant
DOC #588873
Union Correctional Institution
P. O. Box 1000
Raiford, FL 32083

EXHIBIT 1

IN THE CIRCUIT COURT, 13TH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

STATE OF FLORIDA
VS
BRANT, CHARLES, GROVER
DEFENDANT

----------JUDGMENT----------

THE DEFENDANT BRANT, CHARLES, GROVER BEING PERSONALLY BEFORE THIS COURT REPRESENTED WITH PRIVATE ATTORNEY FRASER, ROBERT
PRIVATE ATTORNEY TERRANA, RICK ,
THE ATTORNEY OF RECORD AND THE STATE REPRESENTED BY ASSISTANT STATE ATTORNEY HARB, JALAL, A, AND HAVING

Entered a plea of Guilty to the following crime(s):1,2,3,4,5

COUNT	CRIME	OFFENSE STATUTE NUMBER			DEGREE OF CRIME	COURT ACTION	DATE
1	MURDER IN THE FIRST DEGREE (PR	78204	1	-MURD1000	FC	ADJG	13-AUG-2007
2	SEX. BATT. (DEAD. WEA. OR FORC	794011	3	-RAPE3001	FL	ADJG	13-AUG-2007
3	KIDNAPPING COMMIT FELONY	78701	1A2	-KIDN2000	FP	ADJG	13-AUG-2007
4	GRAND THEFT MOTOR VEHICLE	812014	2C6	-THEF2201	FT	ADJG	13-AUG-2007
5	BURGLARY OF DWELLING WITH ASSA	81002	12A	-BURG1100	FP	ADJG	13-AUG-2007

And no cause being shown why the defendant should not be adjudicated guilty, it is ordered that the defendant is hereby adjudicated guilty of the above crime(s).

AND PURSUANT TO SECTION 943.325, FLORIDA STATUTES, HAVING BEEN CONVICTED OF ATTEMPTS OR OFFENSES RELATING TO SEXUAL BATTERY (CH.794) OR LEWD AND LASCIVIOUS CONDUCT (CH.800) THE DEFENDANT SHALL BE REQUIRED TO SUBMIT BLOOD SPECIMENS.

STATE OF FLORIDA

VS.

BRANT, CHARLES G.
DEFENDANT W/M

FILED
DEC 03 2007
PAT FRANK
CLERK OF CIRCUIT COURT

CASE NUMBER: 04-CF-012631

FINGERPRINTS OF DEFENDANT

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

Fingerprints taken by: A. Robinson 626 — NAME
Bailiff — TITLE

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, _____, and that they were placed thereon by the defendant in my presence in open court this date.

DONE AND ORDERED in open court in Hillsborough County, Florida, this 30th day of Nov., 2007.

JUDGE

689

IN THE CIRCUIT COURT, 13TH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

STATE OF FLORIDA
VS
BRANT, CHARLES, GROVER
DEFENDANT

----------CHARGES/COSTS/FEES----------

A sum of $49.00 pursuant to Section 938.03(1), Florida Statutes (Crime Compensation Trust Fund)

A sum of $1.00 pursuant to Section 938.03(1), Florida Statutes (Crime Compensation Trust Fee)

$2.00 pursuant to Section 938.15, Florida Statutes (Criminal Justice Education by Municipalities and Counties)

A sum of $65.00 pursuant to Section 939.185, Florida Statutes (Circuit Criminal Additional Court Costs)

A sum of $200.00 pursuant to Section 938.05(1)(A), Florida Statutes (Criminal Justice Trust Fund)

A sum of $3.00 as a Court Cost pursuant to Section 938.01, Florida Statutes (Assessments - Florida [Criminal Justice Trust Fund]).

DONE AND ORDERED IN HILLSBOROUGH COUNTY, FLORIDA, THIS 30TH DAY OF November 2007

JUDGE

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

SENTENCE

AS TO COUNT(s) : 1

THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY THE DEFENDANT'S ATTORNEY OF RECORD, PRIVATE ATTORNEY FRASER, ROBERT PRIVATE ATTORNEY TERRANA, RICK AND HAVING BEEN ADJUDGED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE SENTENCED AS PROVIDED BY LAW AND NO CAUSE BEING SHOWN

And the Court having on 13-AUG-2007 deferred imposition of sentence until this date.

IT IS THE SENTENCE OF THE COURT THAT THE DEFENDANT :
Is sentenced to death and is hereby committed to the custody of the Department of Corrections until that sentence is carried out.

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

---------- OTHER PROVISIONS ----------

AS TO COUNT(s) : 1
THE FOLLOWING MANDATORY/MINIMUM PROVISION(S) APPLY TO THE SENTENCE IMPOSED :

JAIL CREDIT: It is further ordered that the defendant shall be allowed a total of 3 Years 5 Months as credit for time incarcerated before imposition of this sentence.

Count 1: STIPULATED
Count 1: STIPULATED

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

SENTENCE

AS TO COUNT(s) : 2,3,5

THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY THE DEFENDANT'S ATTORNEY OF RECORD, PRIVATE ATTORNEY FRASER, ROBERT
PRIVATE ATTORNEY TERRANA, RICK
AND HAVING BEEN ADJUDGED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE SENTENCED AS PROVIDED BY LAW AND NO CAUSE BEING SHOWN

And the Court having on 13-AUG-2007 deferred imposition of sentence until this date.

IT IS THE SENTENCE OF THE COURT THAT THE DEFENDANT :
Is hereby committed to the custody of the Department of Corrections for a term of Natural Life.

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

---------- OTHER PROVISIONS ----------

AS TO COUNT(s) : 2
THE FOLLOWING MANDATORY/MINIMUM PROVISION(S) APPLY TO THE SENTENCE IMPOSED :

JAIL CREDIT: It is further ordered that the defendant shall be allowed a total of 3 Years 5 Months as credit for time incarcerated before imposition of this sentence.

Count 2: STIPULATED
Count 2: STIPULATED

IT IS FURTHER ORDERED THAT THE SENTENCE FOR THIS COUNT SHALL RUN CONCURRENT TO THE SENTENCE SET FORTH IN THE FOLLOWING COUNTS: 1

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

OTHER PROVISIONS

AS TO COUNT(s) : 3

THE FOLLOWING MANDATORY/MINIMUM PROVISION(S) APPLY TO THE SENTENCE IMPOSED :

JAIL CREDIT: It is further ordered that the defendant shall be allowed a total of 3 Years 5 Months as credit for time incarcerated before imposition of this sentence.

Count 3: STIPULATED
Count 3: STIPULATED

IT IS FURTHER ORDERED THAT THE SENTENCE FOR THIS COUNT SHALL RUN CONCURRENT TO THE SENTENCE SET FORTH IN THE FOLLOWING COUNTS: 1,2

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

---------- OTHER PROVISIONS ----------

AS TO COUNT(s) : 5

THE FOLLOWING MANDATORY/MINIMUM PROVISION(S) APPLY TO THE SENTENCE IMPOSED :

JAIL CREDIT: It is further ordered that the defendant shall be allowed a total of 3 Years 5 Months as credit for time incarcerated before imposition of this sentence.

Count 5: STIPULATED
Count 5: STIPULATED

IT IS FURTHER ORDERED THAT THE SENTENCE FOR THIS COUNT SHALL RUN CONCURRENT TO THE SENTENCE SET FORTH IN THE FOLLOWING COUNTS: 1,2,3

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

SENTENCE

AS TO COUNT(s) : 4

THE DEFENDANT, BEING PERSONALLY BEFORE THIS COURT, ACCOMPANIED BY THE DEFENDANT'S ATTORNEY OF RECORD, PRIVATE ATTORNEY FRASER, ROBERT
PRIVATE ATTORNEY TERRANA, RICK
AND HAVING BEEN ADJUDGED GUILTY HEREIN, AND THE COURT HAVING GIVEN THE DEFENDANT AN OPPORTUNITY TO BE HEARD AND TO OFFER MATTERS IN MITIGATION OF SENTENCE, AND TO SHOW CAUSE WHY THE DEFENDANT SHOULD NOT BE SENTENCED AS PROVIDED BY LAW AND NO CAUSE BEING SHOWN

And the Court having on 13-AUG-2007 deferred imposition of sentence until this date.

IT IS THE SENTENCE OF THE COURT THAT THE DEFENDANT :
Is hereby committed to the custody of the Department of Corrections for a term of: 5 Years

DEFENDANT BRANT, CHARLES, GROVER

DIVISION : TR2
CASE NUMBER : 04-CF-012631
OBTS NUMBER : 2901092212

OTHER PROVISIONS

AS TO COUNT(s) : 4

THE FOLLOWING MANDATORY/MINIMUM PROVISION(S) APPLY TO THE SENTENCE IMPOSED :

JAIL CREDIT: It is further ordered that the defendant shall be allowed a total of 3 Years 5 Months as credit for time incarcerated before imposition of this sentence.

Count 4: STIPULATED
Count 4: STIPULATED

IT IS FURTHER ORDERED THAT THE SENTENCE FOR THIS COUNT SHALL RUN CONCURRENT TO THE SENTENCE SET FORTH IN THE FOLLOWING COUNTS: 1,2,3,5

IN THE EVENT THE ABOVE SENTENCE IS TO DEPARTMENT OF CORRECTIONS, THE SHERIFF OF HILLSBOROUGH COUNTY, FLORIDA, IS HEREBY ORDERED AND DIRECTED TO DELIVER THE DEFENDANT TO THE DEPARTMENT OF CORRECTIONS AT THE FACILITY DESIGNATED BY THE DEPARTMENT TOGETHER WITH A COPY OF THIS JUDGEMENT AND SENTENCE AND ANY OTHER DOCUMENTS SPECIFIED BY FLORIDA STATUTE

THE DEFENDANT IN OPEN COURT WAS ADVISED OF THE RIGHT TO APPEAL FROM THIS SENTENCE BY FILING NOTICE OF APPEAL WITHIN 30 DAYS FROM THIS DATE WITH THE CLERK OF THIS COURT AND THE DEFENDANT'S RIGHT TO THE ASSISTANCE OF COUNSEL IN TAKING THE APPEAL AT THE EXPENSE OF THE STATE ON SHOWING OF INDIGENCY.

DONE AND ORDERED IN HILLSBOROUGH COUNTY, FLORIDA, THIS 30TH DAY OF November 2007

JUDGE

EXHIBIT 2

THIRTEENTH JUDICIAL CIRCUIT COURT
HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL DIVISION

FILED
NOV 30 2007
PAT FRANK
CLERK OF CIRCUIT COURT

STATE OF FLORIDA

VS.

CHARLES B. BRANT

CASE NO. 04-12631
DIVISION E (TD-2)

DATE 12/4/07 RULING Corrected orally COMMENTS Amended 12/4/07 JUDGE WILLIAM P. LEVENTE

SENTENCING ORDER

Charles Brant was arrested on 4 July 2004 for offenses of first degree murder, sexual battery, kidnap, grant theft auto, and burglary with assault or battery, which he committed on 1 July 2004. The victim of the offenses is Sara Radford. A Grand Jury indicted him for those offenses on 14 July 2004.

The State filed its notice of intent to seek the death penalty on 2 September 2004.

The State is represented by Jalal Harb, Esq. Defendant is represented by Robert Fraser, Esq. for the penalty phase, and by Rick Terrana, Esq. for the guilt phase.

After engaging in discovery and pretrial motions, Defendant pled guilty on 25 May 2007 to all counts, open, without benefit of any plea agreement with the State. He specifically reserved his right to appeal the dispositive issue in the Court's pretrial order denying a Fla.R.Crim.P. 3.190(c)(4) motion to dismiss the kidnap count.

On 13 August 2007 the Court adjudicated Defendant guilty, and on 20 August 2007 the parties and the Court attempted, unsuccessfully, to empanel a penalty phase jury for an advisory sentence.

On 22 August 2007 Defendant advised the Court that he wished to waive his right to a penalty phase jury advisory sentence. The Court conducted a colloquy and accepted his waiver. The Court did not insist on a jury advisory verdict as it could have. *See State*

v. Carr, 336 So.2d 358 (Fla. 1976); Sireci v. State, 580 So.2d 450 (Fla. 1991); and Mohammed v. State, 782 So.2d 343 (Fla. 2001).

Penalty Phase Proceeding

The penalty phase began on 22 August 2007 and finished on 24 August 2007. The State presented evidence of the facts of the offenses, which subsumed in part the evidence relating to its proposed aggravating circumstances, and additional evidence of other proposed aggravating circumstances.

The State also presented victim impact evidence by way of several letters and photographs in State Exhibits 27, 79, 80, and 81. Lina Vartanian, the victim's cousin, read certain victim impact letters into the record on 23 August 2007.

The Court will not consider this evidence in the weighing process.

Defendant presented evidence of his proposed mitigating circumstances by direct examination of witnesses he called to testify, by offering certain documents in evidence, and by cross examination of witnesses the State called to testify.

The State offered in rebuttal, the testimony of Dr. Donald Taylor, who had examined Defendant pursuant to Fla.R.Crim.P. 3.202, and two (2) transcribed prior sworn statements of Garrett Coleman, Defendant's half brother, to which Defendant stipulated.

On 8 October 2007 the Court conducted a *Spencer v. State, 615 So.2d 688 (Fla. 1993)* hearing at which Defendant presented additional evidence in mitigation. Defendant elected to not testify at either the trial or the *Spencer* hearing.

The parties presented the aggravating circumstance evidence and the mitigating circumstance evidence to an extent out of order. Some of the witnesses provided testimony relevant to both issues.

The Court directed counsel to submit sentencing memoranda to include authorities and arguments relating to aggravation and mitigation. Both counsels timely did so.

The Court will summarize the evidence and arguments and authorities in detail, and because this was a Bench proceeding with State and defense witnesses being called out of order, the Court will, where appropriate, italicize the mitigation matters.

The aggravating circumstances proposed by the State in its memorandum are:

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

b. The capital felony was committed while engaged in the commission of sexual battery, burglary, or kidnap. § 921.141(5)(d), Fla. Stat.

c. The capital felony was committed to avoid or prevent lawful arrest (to eliminate a witness). § 921.141(5)(e), Fla. Stat.

d. The capital felony was committed for pecuniary gain. § 921.141(5)(f), Fla. Stat.

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

Defense counsel concedes that the State's evidence established and proved, beyond a reasonable doubt, the aggravating circumstance of "heinous, atrocious, or cruel," and the aggravating circumstance of "while engaged in the commission of a felony," but argues that the Court should not give them great weight, and additionally argues that the State did not prove, beyond a reasonable doubt, the aggravating

circumstances of "for pecuniary gain" or "to avoid or prevent lawful arrest," or "cold, calculated, and premeditated," and that the Court should so find and not consider or weigh them.

The mitigating circumstances proposed by the Defendant in his memorandum are:

a. He suffered an abusive childhood, has impaired intellectual functioning, reduced impulse control, and a drug dependency, which collectively served to substantially impair his ability to conform his conduct to the requirements of the law. § 921.141(6)(f), Fla. Stat.

b. He is not a sociopath or a psychopath, and does not suffer from antisocial personality disorder. § 921.141(6)(h), Fla. Stat.

c. He had poor impulse control and was not able to make sound decisions because of methamphetamine abuse, and suffered periods of psychosis due to such abuse at and around the time of the offenses. § 921.141(6)(h), Fla. Stat.

d. He suffered from chronic and recurring major depression and sexual obsessive disorder, and exhibited symptoms of attention deficit disorder. § 921.141(6)(h), Fla. Stat.

e. He is a good father. § 921.141(6)(h), Fla. Stat.

f. He is a good worker and craftsman. § 921.141(6)(h), Fla. Stat.

g. He has a reputation for being peaceful and non-violent. § 921.141(6)(h), Fla. Stat.

h. He is remorseful. § 921.141(6)(h), Fla. Stat.

i. He cooperated with law enforcement officers first by trying to turn himself in to authorities, then by voluntarily accompanying officers to the station house while not under arrest, then when interrogated by ultimately confessing to the charged offenses, and finally by pleading guilty rather than requiring the State to prove his guilt at a jury trial. § 921.141(6)(h), Fla. Stat.

j. He has borderline verbal intelligence. § 921.141(6)(h), Fla. Stat.

k. His family has a history of mental disorders. § 921.141(6), Fla. Stat.

l. His drug abuse and dependency were not the result of recreational drug use, rather, were the result of a desire to be able to work longer hours. § 921.141(6), Fla. Stat.

The State concedes that most of the proposed mitigating circumstances have been established by the evidence, but argues that the Court should give them little or only moderate weight, and further argues that some of the proposed mitigating circumstances were not established by the evidence, and that the Court should so find.

Plea Colloquy

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

> The Defendant lived in a house close to Ms Radfar's residence, and that at some time prior, he and his wife lived in that same apartment. On 1 July 2004 in the evening hours while his wife and children were at a movie, Defendant went to Ms Radfar's residence and managed to get inside where he killed Ms Radfar by strangulation and suffocation. He used his hands, a plastic bag, a dog leash, an electrical cord, and stockings
>
> Law enforcement officers found Ms Radfar's naked body in her shower with the water pouring over her body. Vaginal swabs showed Defendant's DNA in the collected semen.
>
> Law enforcement officers questioned Defendant on 4 July 2004 and he admitted having vaginal intercourse with Ms Radfar; that he entered her residence because he wanted to take photographs of tile work he had done to the apartment; that when she came out of the bathroom he grabbed her and threw her on a bed and raped her without her consent, and that she resisted by words and acts.
>
> The Defendant forcibly, secretly, and by threat, confined and abducted and imprisoned the victim with intent to inflict bodily harm and to terrorize her.
>
> At a time when he thought the victim was dead and while searching the residence, the victim got up and

attempted to go out the door. He grabbed her, took her back to the bedroom and suffocated and choked her to death. He put her body in the bathroom and under the shower in an effort to clean her up. She was hiccupping.

When law enforcement officers entered her residence, they found cleaning materials, and later found her Bronco vehicle near the residence

The Defendant assaulted and battered the victim in her residence, which he entered under the pretense of taking pictures of tile work.

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

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

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

Law enforcement officers interviewed Defendant in Orange County on 4 July 2004 and recorded the session, which the State transcribed. After the interview they arrested him and thereafter booked him into the Hillsborough jail on 7 July 2004. The State did not offer into evidence the recorded statement or the entire content of the statement. Defendant offered the entire recorded statement. The statement contains evidence that supports aggravation and evidence that supports mitigation.

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

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

How did you kill her?
Strangulation

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

What else did you use?
I guess my hands

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

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

Was it against her will?
Yes

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

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

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

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

How did you have sex with her – vaginally or anally?
Vaginal, once, I don't know how long

And then what did you do?

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

Where did you get that from?

The other bedroom

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

No

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

No. Not ...

What did she say?

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

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

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

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

I don' know how long it was

After you did that, then what did you do?

Took her into the bathroom and then she was ...

Was she dead already then?

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

Where did you get the leather dog leash from?

Off the floor ... I think the bedroom.

Where did you get the heater pad from?

The other bedroom floor … I don't remember

Where you had sex with her or the other bedroom?

No, the other one, the other one

Were you panicking? I mean why were you grabbing all of these things to put around her neck?

I don't know, I just don't know … she just kept struggling or wouldn't die or …I don't know

So you put her in the bath tub … what did you do then, after all this stuff is around her neck?

I don't know. I washed her down. Tried to wash everything off of her … with just water.

What did you do then?

Cried … in between the two bedrooms and the door … and the bathroom door.

What did you do after that?

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

Where did you park her car?

I don't know … Friendship Trail, the little dirt area.

How did you leave her house?

Through the front door

Did you ever go back into her house again?

Yes. The next day, right before the officer got there I wiped my prints. Trying to wipe off the most stuff I could. I started thinking about things. I had touched and this and that. I was trying to wipe everything off.

Did you try to make it look like a burglary?

No.

Did you open the back window?

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

Were you in the house when the cops came to the house?

Just got in there and was trying to clean up and that's ...

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

Yes

When did you put all the stuff in your trash cans?

I don't know ... when I got back from the Bronco ... when I parked the Bronco and came back.

Did she expect you?

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

Did you wear a condom?

No

Did you ejaculate in her?

Yes

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

No

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

Yes

Did you ask your wife to do something?

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

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

No

Do you have any questions?

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

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

Is there anything else you want to say?

That I'm sorry for hurting that girl and hurting her family and just seeing her family there crying and Steve. I don't what made me do it [crying]. I just don't know. [1]

The State also offered into evidence numerous photographs and items of physical evidence, to many of which Defendant did not object, and to others of which Defendant did object, primarily on the ground of lack of relevance to any proposed aggravating circumstance. The Court sustained some defense objections and over-ruled others, and as to still others, the Court received the objected-to exhibit into evidence with the understanding that the Court would not consider an objected-to exhibit in its weighing process if it determines it is not relevant to any proposed aggravating circumstance. Many of the State's exhibits served only to establish the scene of the crimes and are not relevant or helpful to the issues this Court must analyze.

Specifically, Court received in evidence certain photographs, including State Exhibits 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59. Most are photographs of the deceased as she was found in her tub, and are relevant to two of the five proposed aggravating circumstances – "heinous, atrocious, or cruel," and "while engaged in a sexual battery, burglary, or kidnap." They also include a close view of the

---

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

deceased's face in her tub; a view of the deceased with the plastic bag over her face and ligatures around her neck; a view of the deceased's face with a ligature around her neck; a view of the back of the deceased's head showing the nylon stocking knotted at the back of her neck; a view of the right side of the deceased's face after the bag and ligatures were removed; a view of the left side of her neck; a view of a bruise under her left breast area; a view of two minor puncture wounds; a view of bruising on the back of her left upper arm; a view of injuries to the back side of her left hand; a view of bruising on the back of her right upper arm; a picture of the nylon ligature; a picture of the heating pad electrical cord ligature; and a picture of the dog leash ligature. These are relevant and the Court will consider them.

The Court will sustain in part Defendant's objections to State's Exhibits 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 24, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, and 74, which consist of photographs and other items of physical evidence, as not relevant to any aggravating circumstance. They are relevant to establish the circumstances of the offenses, since the Court did not hear evidence during a trial, and the Court will receive and consider them for that limited purpose.

The witnesses testified as follows.

Melissa McKinney, Defendant's former wife, called by the State, testified that she married Defendant in 1991 and that they divorced in 2004. *They have two sons, Seth and Noah.* They at one time lived in Ms. Radfar's house. On 1 July 2004, a Thursday, she worked during the day and took the children to a movie in the evening. Defendant did not appear to her to be under the influence of drugs that afternoon or when she returned

from the movies in the evening, and he did not act abnormally in any way. Before they went to bed he asked her to cut his hair because of his concern for a lice problem, which she did. He normally wanted his hair long. He went to Orlando to his mother's house Friday afternoon unexpectedly.

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

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

During approximately the six months period before the murder, she and Defendant engaged in sex games. During intercourse he would hold her hands above her head and tie her up, and on other occasions he would sneak in and sexually "assault" her. She did not object initially, until he became too rough and hurt and bruised her. When she protested, he would relent, but he continued to "surprise" her in much the same manner, and would hide in the apartment and "assault" her. On one such occasion she called 911 because she did not know it was her husband "assaulting" her while masked, until he pulled off the mask. Their daily sexual relationship reached the point

where it consisted of "normal" consensual sexual intercourse and frequent not-consensual "rough" sexual intercourse. On 30 June 2004, Wednesday, Defendant "attacked" her by surprise by hiding in the bedroom and throwing her on the bed face down and attempting to bind her hands and attempting to put a sock in her mouth. He pulled her pants down. She was able to get away and go the bathroom. She stayed in the bathroom the entire night. The next morning when she asked him why he had done it and told him he would have to stop, he responded that he didn't do anything. She threatened to call the police. She knew he was using methamphetamine during this incident, and had been up for several days.

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

got up and walked to the door, she was unconscious. She further opined that the victim lived through some of the attack.

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

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

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

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

Thomas Rabeau, a former volunteer Chaplain at the Hillsborough County Jail called by Defendant, visited with Defendant weekly after his incarceration in 2004

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

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

> The Defendant initially told other deputies or detectives that he had seen a man running from the victim's apartment, but during the interview admitted that he assaulted and killed the victim in her home. He summarized the incriminating portions contained in the recorded interview. He testified that the Defendant appeared sober on 4 July 2004 during the interview, and that he initially said that he had seen a person running through the back yard wearing a raincoat. He later changed his story and said that he went to Ms. Radfar's house to take pictures of the floor for his portfolio and that she let him in and that he started taking pictures. When she came out of the bathroom, he didn't know why, he grabbed her forcefully and dragged her onto a bed and sexually assaulted her vaginally against her will and did not use a condom. He placed a sock in her mouth to keep her quiet. He choked and suffocated her for a little bit and he thought she had passed out or was dying, and he thought she was not a threat and got off the bed looking around the house. At some point she gained consciousness, jumped from the bed, and ran to the front door. He grabbed her and took her back to the room and choked her manually and placed a plastic bag over her head to suffocate her. He then took her to the bathroom and put her in the tub. He thought she was

> dead but was hiccupping. He then got a leash and an electrical cord and wrapped them around her neck to strangle her. He also used a stocking around her neck,

The State did not offer into evidence the recorded statement which contained evidence of remorse. [2]

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

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

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

Kathy Smith, a retired HCSO homicide detective called by the State, had contact with Defendant on 2 July 2004 at 5:00 p.m. He appeared lucid and coherent. She recovered items of incriminating evidence in Defendant's garbage, including a white in color man's shirt, latex gloves, the victim's car keys, her Visa debit card, a hosiery box,

---

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

and hair clippings. The Defendant told her he had seen the victim with a white male of whom he gave a detailed description, and had seen someone fleeing from the scene wearing a yellow raincoat.

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

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

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

The State rested after the testimony of Detective Losat.

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

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

if sentenced to life imprisonment, Mr. Brant might develop the capacity to counsel fellow inmates.

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

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

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

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

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

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

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

On further examination by Mr. Harb, Ms. Milliner described that Mr. Coleman was not close to Defendant, and that there was no affection between them, apparently

because he was the product of Crystal's prior marriage. Mr. Coleman had a bad temper and Defendant did not. Mr. Coleman abused drugs.

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

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

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

Sherry Coleman, the Defendant's older sister, called by Defendant, testified that as a child she lived with Defendant, Crystal Coleman, and Marvin Coleman. Marvin Coleman was a bully with Defendant and was verbally and mentally abusive to their

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

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

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

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

In July, 2004 she learned that Chuck had told their brother Garret about what happened to Sara, and that he somehow was a part of it and wanted to turn himself in. They all went to a police station to turn him in but it was closed, so they went to another police station in Orlando to turn him in, but the officer told him they did not have any information on him.

Dr. Valerie McClain, a psychologist called by Defendant, evaluated Defendant in 2005. She did psychological testing and reviewed pertinent documents and reports. She

diagnosed Defendant as having polysubstance dependence, major depression-recurrent, and cognitive disorder – not otherwise specified.

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

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

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

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

Mr. James Ellis Harden, son of James Donald Harden, was called by the State in rebuttal. His testimony rebutted nothing. **The Court will disregard his testimony**.

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

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

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

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

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

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

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

In the August, 2004 statement, *Garrett Coleman described his father Marvin Coleman as mentally abusive to the entire family, and physically abusive to Chuck, especially when he was a teenager. He abused alcohol for many years and at one point in his life stopped drinking, and stopped being so abusive to the family.* Defendant went to Garrett Coleman's home after the homicide, and told him he had hallucinations and

that he might be involved in the homicide they were investigating. *The Defendant told him he wanted to talk to the police, and they went to a local police station to turn himself in to the police. He knew Defendant had been using Ecstasy at that time and before then, and knew about the effects it had on his life. He also knows him to not be violent.* In the July, 2006 statement, Garrett Coleman stated that *when Defendant came to his house after the homicide, he was "messed up on crystal meth, still smoking it," and that he could not understand what he was saying, but he know there was a problem. He again described how they tried to go to the police, and how his brother told him he had been hooked on crystal meth for several months and was getting progressively words. Defendant slept at his home and they went to the beach the next day. Defendant was again high on drugs and told him that he used what he had left. He described him as always being responsible, having a good job, and loving his family. He told him he was sorry, that he didn't mean to hurt the family by doing it, that it just happened.*

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

The Court will consider this as mitigation.

State's Arguments in Support of Aggravating Circumstances

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

The Capital Felony was Especially Heinous, Atrocious, or Cruel

Defendant gained entry to victim's residence and grabbed and dragged her and pushed her onto the bed and raped her. She resisted and struggled with him. He tied her mouth with a stocking after stuffing her mouth with a sock. After he raped her and while

he was looking around the house, she got up from the bed and went towards the door. He grabbed her and took her to the bedroom where he suffocated her and strangled her, using his hand, a sock, a stocking, an electrical cord, a dog leash, and a plastic bag. He then placed her in the bathtub. She was hiccupping at the time. She was conscious and aware for the majority of the assault. During the sexual assault the victim yelled at Defendant to stop, and after the assault she and he spoke. She suffered 13 to 15 injuries, some of which were defense and some of which were painful.

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

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

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

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

Defendant unlawfully entered or remained in the victim's dwelling with intent to commit an offense, and committed a kidnapping and sexual battery. The burglary,

kidnapping, and sexual battery are statutorily enumerated offenses to which Defendant pled guilty. The State cites no authority, and argues this aggravating circumstance was proven beyond a reasonable doubt and that the Court should give it great weight.

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

The Defendant's intercepting the victim's attempt to leave her residence and his actions after the murder including cleaning the victim's body and removing physical evidence are evidence of a continuation of his attempt to avoid detection.

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

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

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

The circumstances that support this aggravator are that shortly before the homicide, the victim's boyfriend moved out of their common residence, and she lived alone. Defendant and his family had lived in that same unit and moved out about a year before the homicide, and was therefore familiar with the residence. He still had in his possession a key and the Defendant gave it to him. Defendant told others that a few days

prior to the homicide the victim asked him to inspect her windows to make sure they were secured, and he did the inspection. Defendant could have entered or left the residence through a rear window. Defendant's wife testified that she and Defendant engaged in sex daily, and that once every two weeks he would force her into rough sex, during which he would wear latex gloves and would stuff a sock in her mouth; and that they last had forced sex the night before the murder and that the next morning she threatened to report him to the police. The Defendant claimed he went to the victim's residence to take pictures, but he there is no evidence he had a camera or took pictures, or that he told his family about his plans to take pictures. He declined to go to the movies with his family. Collected physical evidence, including latex gloves, a sock, a stocking, and a yellow raincoat suggests he took these items to the victim's residence.

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

The State cites *Jackson v. State, 648 So.2d 85 (Fla. 1994); Rogers v. State, 511 So.2d 526 (Fla. 1987); Hill v. State, 422 So.2d 816 (Fla. 1982),* and argues the evidence proves this aggravating circumstance beyond a reasonable doubt, in that that the Defendant's actions reached a level of heightened premeditation, and that he acted with cool and calm reflection without any pretense of legal or moral justification, and that the Court should give it great weight.

The Capital Felony Was Committed for Pecuniary Gain

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

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

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

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

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

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

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

Pecuniary Gain

Counsel argues that the evidence is that the Defendant only moved the victim's car 388 feet from the residence, apparently to mislead anyone looking for her, and that nominal personal property taken from the residence, which he discarded, does not

provide or establish a motive for murder. Counsel cites *Chaky v. State, 651 So.2d 1169 (Fla. 1995); Peek v. State, 395 So.2d 492 (Fla. 1980).*

Cold, Calculated, and Premeditated

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

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

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

Witness Elimination

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

He further argues that the victim's ability to identify him as the person who assaulted her, standing alone, is not sufficient to justify a finding of witness elimination. Counsel cites *Farina v. State, 801 So.2d 44 (Fla. 2001); Consalvo v. State, 697 So.2d 805 (Fla. 1996); Jennings v. State, 718 So.2d 144 (Fla. 1998); Davis v. State, 698 So.2d 1182 (Fla. 1997).*

Heinous, Atrocious, or Cruel

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

Committed While Committing Sexual Battery, Burglary, or Kidnapping

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

Defendant's Arguments in Support of Mitigating Circumstances

Counsel argues that Marvin Coleman mentally, emotionally, and physically abused Defendant from the age of 5 to the age of 17 when he moved out of the house. He

belittled him constantly, apparently because he was not his biological child. He told him he would never be anything. He told him he could beat him; that he would never be a man, and that he would end up in jail someday. He was alcoholic and used marijuana. He abused the entire family, and also sexually abused Defendant's sister Crystal. He never showed affection to any of the children

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

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

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

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

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

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

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

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

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

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

Defendant felt and exhibited remorse for his conduct, as attested to by Mr. Rabeau and others. Defendant confessed to Detective Losat, during which he showed remorse. He also attempted to turn himself in to authorities, and agreed to accompany detectives from his mother's home to the station house, though not under arrest at the time.

Analysis and Findings

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

Proposed Aggravating Circumstances

Pecuniary Gain

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

The Court will not weigh this proposed aggravating circumstance.

Witness Elimination

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

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

The Court will not weigh this proposed aggravating circumstance.

Cold, Calculated, and Premeditated

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

The Court will not weigh this proposed aggravating circumstance.

During Course of Committing Sexual Battery

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

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

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

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

The Court accords great weight to this aggravating circumstance.

Heinous, Atrocious, or Cruel

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

The Court accords great weight to this aggravating circumstance.

Proposed Mitigating Circumstances

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

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

Weighing

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

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

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

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

Defendant's mother and he sexually abused the sister. The step father was an alcoholic and an evil person to the children.

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

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

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

He came to be a good and reliable worker and competent craftsman, and supported his family. He was a good father and husband. He has a reputation for non-violence. Although Defendant has borderline verbal intelligence, he feels and has expressed genuine remorse for his actions. He attempted to turn himself in to the police the day after he killed the victim, and he cooperated with detectives when they went to his mother's home to interview him, and he ultimately confessed to the crimes. He later

pled guilty to the murder and other charges, which dispensed with requiring the State to prove his guilt to a jury, and he waived his right to a jury advisory sentence.

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

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

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

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

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

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

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

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

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

9. *Defendant has diminished impulse control and is not able to make sound decisions because of his methamphetamine abuse, and exhibits periods of psychosis.*

Defendant has recognized his drug dependence problem and has sought help.

Defendant used methamphetamine before, during, and after the murder and other crimes.
The Court accords these circumstances moderate weight

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

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

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

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

Sentence

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

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

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

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

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

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

The Court awards three (3) years and five (5) months credit for time served.

The Court does accordingly

ORDER that Charles G. Brant be taken by the proper authorities to Florida State Prison (FSP), and there be kept under confinement until a date for execution is set. The Court does further

ORDER that on said date, Charles G. Brant be put to death in the manner provided by law.

Defendant has thirty (30) days to appeal the judgments and sentences.

DONE AND ORDERED in open Court at Tampa, Hillsborough County, Florida, this 30th day of November, 2007.

William Fuente

WILLIAM FUENTE
CIRCUIT JUDGE

Copies furnished to:

Jalal Harb, Esq.
Office of the State Attorney
800 E. Kennedy Blvd.
Tampa, Florida 33602

Rick Terrana, Esq.
2917 W Kennedy Blvd
Suite 120
Tampa, FL 33609

Robert Fraser, Esq.
P.O. Box 3470
Brandon, FL 33509