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IN THE SUPREME COURT OF FLORIDA

BRETT A. BOGLE, :

Appellant, :

vs. : Case No. 81,345

STATE OF FLORIDA, :

Appellee. :

______________________________ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

PAGE NO.

PRELIMINARY STATEMENT 1

ARGUMENT 2

ISSUE I

THE COURT BELOW SHOULD HAVE DISQUALIFIED THE OFFICE OF THE STATE ATTORNEY FOR THE THIRTEENTH JUDICIAL CIRCUIT FROM PROSECUTING BRETT BOGLE AFTER ONE OF BOGLE'S ATTORNEYS WENT TO WORK FOR THE PROSECUTION PRIOR TO BOGLE'S NEW PENALTY TRIAL. 2

ISSUE II

THE COURT BELOW ERRED IN PREVENTING BRETT BOGLE'S PENALTY PHASE JURY FROM CONSIDERING EVIDENCE THAT WAS CRITICAL TO HIS DEFENSE. 3

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO GIVE BRETT BOGLE'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS, AS THE INSTRUCTIONS WHICH WERE GIVEN IMPROPERLY LIMITED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES, DENYING BOGLE DUE PROCESS, A FAIR JURY TRIAL AND RELIABLE SENTENCING RECOMMENDATION IN VIOLATION OF ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 5

ISSUE IV

THE COURT BELOW ERRED IN INSTRUCTING BRETT BOGLE'S JURY ON, AND FINDING THE EXISTENCE OF, INAPPLICABLE AGGRAVATING CIRCUMSTANCES. 6

TOPICAL INDEX TO BRIEF (continued)

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING BRETT BOGLE TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS. 10

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF CITATIONS

CASES	PAGE NO.
Bowden v. State, 588 So. 2d 225 (Fla. 1991)	7, 8
Cheshire v. State, 568 So. 2d 908 (Fla. 1990)	5
Elam v. State, 19 Fla. L. Weekly S175 (Fla. April 7, 1994)	8, 9
Gilliam v. State, 582 So. 2d 610 (Fla. 1991)	8
Halliwell v. State, 323 So. 2d 557 (Fla. 1975)	8
Morgan v. State, 19 Fla. L. Weekly S290 (Fla. June 2, 1994)	10
Owen v. State, 596 So. 2d 985 (Fla. 1992)	6, 7
State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985)	2
Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992)	4, 7, 10
Wyatt v. State, 19 Fla. L. Weekly S247 (Fla. May 5, 1994)	6

OTHER AUTHORITIES	
§921.141(5)(e), Fla. Stat. (1991)	6
§921.141(5)(h), Fla. Stat. (1991)	6

PRELIMINARY STATEMENT

The clerk of the circuit court did not number all pages of the record consecutively, but numbered the pages of the record containing documents from the court file, and then began with page 1 again when numbering the pages of the transcripts of the trial and hearings. To avoid confusion regarding to which pages Appellant is referring in this brief, Appellant will cite pages from the portions of the record containing documents from the court file by using "R" followed by the page number, and will cite pages from the transcripts of the trial and hearings by using "T" followed by the page number.

Appellant will reply upon his initial brief in reply to the arguments presented in the State's answer brief as to Issues IV.B. and V.

ARGUMENT

ISSUE I

THE COURT BELOW SHOULD HAVE DISQUALIFIED THE OFFICE OF THE STATE ATTORNEY FOR THE THIRTEENTH JUDICIAL CIRCUIT FROM PROSECUTING BRETT BOGLE AFTER ONE OF BOGLE'S ATTORNEYS WENT TO WORK FOR THE PROSECUTION PRIOR TO BOGLE'S NEW PENALTY TRIAL.

Appellee says on pages 3-4 of its brief that in State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985), "the disqualified attorney had not had any conversations or contact with state attorney personnel regarding the defendant's case." In the instant case, of course, Appellant's former lawyer did have conversation about Appellant and his case with one of the two assistant state attorneys who would be handling Appellant's new penalty trial, Nick Cox. Appellant commends to this Court the dissenting opinion of Justice Ehrlich in Fitzpatrick, in which Justice Shaw concurred, which discusses the appearance of impropriety which may arise from a situation where the former defense attorney goes to work for the prosecution.

ISSUE II

THE COURT BELOW ERRED IN PREVENTING BRETT BOGLE'S PENALTY PHASE JURY FROM CONSIDERING EVIDENCE THAT WAS CRITICAL TO HIS DEFENSE.

Appellee incorrectly states at page 9 of its brief that during the testimony of defense witness Mary Shrader, Appellant "attempted to introduce the photos Det. Lingo had taken of the defendant after the crime." These photographs were already in evidence, having been introduced by the State and admitted during the testimony of Detective Larry Lingo. (R 296-298, T 1275-1276) Appellant wished to use the photos in his direct examination of Shrader. He was not, as Appellee contends, trying to raise a lingering doubt concerning his guilt of the homicide. One of the things he was trying to accomplish was to raise a doubt about Appellant's guilt of sexual battery, but this was entirely proper; Appellant was never charged with nor convicted of sexually battering Margaret Torres, and his new penalty phase jury was called upon to consider whether the homicide was committed while Appellant "was engaged in the commission of or attempted commission of the crime of sexual battery." (T 1615) Mary Shrader's testimony concerning the pictures of Appellant which showed the scratches was relevant to this issue, as well as being relevant for the other reasons discussed in Appellant's initial brief at pages 51-53.

Appellee quotes extensively from defense counsel's penalty phase closing argument at pages 11-13 of its brief and concludes that the reason Appellant's attorney "did not argue that the scratches were the result of the car accident was not because the

evidence was excluded[.]" This, of course, is pure speculation; counsel's reasons for arguing as he did are unknown. It may very well be that counsel _did_ refrain from arguing that the scratches resulted from the car accident precisely because he did not feel that the argument would carry much weight without Mary Shrader's testimony to support it.

Waterhouse v. State, 596 So. 2d 1008, 1015 (Fla. 1992), cited by Appellee on page 13 of its brief, is inapposite. "Waterhouse was not precluded from challenging the State's evidence that a sexual battery occurred or from presenting evidence that a sexual battery did not occur." 596 So. 2d at 1015. The point here is precisely that Appellant _was_ prevented from presenting important relevant evidence that impeached the State's witnesses and went to the issue of whether a sexual battery occurred.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO GIVE BRETT BOGLE'S REQUESTED PENALTY PHASE JURY INSTRUCTIONS, AS THE INSTRUCTIONS WHICH WERE GIVEN IMPROPERLY LIMITED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES, DENYING BOGLE DUE PROCESS, A FAIR JURY TRIAL AND RELIABLE SENTENCING RECOMMENDATION IN VIOLATION OF ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee misstates Appellant's argument on page 14 of the Brief of the Appellee by indicating that the issue is based solely upon Cheshire v. State, 568 So. 2d 908 (Fla. 1990). Appellant's argument regarding the instructions given to his penalty phase jury is not so narrow, but involves broad constitutional considerations, and his right to have the jury consider all evidence he presented in support of a sentence less than death, without being constrained by arbitrary requirements that the evidence must rise to some certain level before it truly constitutes mitigation.

Appellee notes at page 17 of its brief that the trial court discussed "capacity to conform conduct" in her sentencing order. This did not, of course, cure the infirmity in the way Appellant's jury was instructed. The trial judge may have known that she was obligated to consider Appellant's impaired capacity, whether or not the impairment was "substantial," but this was not made clear in her charge to Appellant's jury.

ISSUE IV

THE COURT BELOW ERRED IN INSTRUCTING BRETT BOGLE'S JURY ON, AND FINDING THE EXISTENCE OF, INAPPLICABLE AGGRAVATING CIRCUMSTANCES.

A. Prior violent felony

Appellee states at page 20 of its brief that the facts in support of the finding of the prior violent felony aggravating circumstance "only go the weight the court should afford the factor and not to the validity of the finding." Apparently, Appellee is conceding that the prior violent felony aggravator is entitled to little weight under the circumstances of this case. This concession is relevant to Issue VI below, which deals with proportionality.

C. Avoid arrest

In addition to the cases cited in Appellant's initial brief, please see Wyatt v. State, 19 Fla. L. Weekly S247 (Fla. May 5, 1994), a recent case in which this Court found the evidence not to support the trial court's finding of the section 921.141(5)(e) aggravating factor.

D. HAC

The cases cited by Appellee on page 25 of its brief in support of the trial court's finding of the section 921.141(5)(h) aggravating factor are distinguishable from Appellant's cause. Appellee says that in Owen v. State, 596 So. 2d 985 (Fla. 1992), the victim

was raped and beaten. The opinion shows, however, that she was subjected to much more:

> The sleeping victim was struck on the head and face with five hammer blows. She awoke screaming and struggling after the first blow and lived for a period of from several minutes to an hour. Her neck was constricted with sufficient force to break the bones therein. She was sexually assaulted and the walls of her vagina were torn by a foreign object, such as the hammer handle.

596 So. 2d at 990. Owen "bludgeoned the sleeping victim before strangling and sexually assaulting her." 596 So. 2d at 990. The homicide in Owen clearly involved a much more vicious episode than what was proven to have occurred in the instant case.

Similarly, the homicide in Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992) involved a more aggravated incident than the one involved herein; there the victim was raped anally with a large object, cut and beaten severely (she suffered 30 lacerations and 36 bruises), drowned,[1] and made to suffer other indignities. (Please see recitation of facts at 596 So. 2d 1010-1011.)

In Bowden v. State, 588 So. 2d 225 (Fla. 1991), although the appellant raised as an issue that the especially heinous, atrocious, or cruel aggravating circumstance is applied arbitrarily and fails to limit the class of persons eligible for the death penalty (588 So. 2d at 228, footnote 1.), he did not challenge the sufficiency of the evidence to support the aggravator in his case, and

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[1] Drowning was the cause of death in Waterhouse; here it was blunt trauma to the head of Margaret Torres.

so this Court was not called upon to assess the applicability of HAC to the beating death involved in Bowden.

Finally, in Gilliam v. State, 582 So. 2d 610 (Fla. 1991),

> [t]he victim sustained brutal injuries. The medical experts testified that death was caused by strangulation; the victim had injuries to her face, neck, breast, shins, arms, rectum, and vagina; she had bruises from being grabbed; one of her nipples was almost bitten off by appellant; from the anal rape there were tears extending through the anal and rectal region, including into the skin surrounding the anus (where, in the words of the trial judge, she was in effect torn apart); there was hemorrhaging from the vagina to the neck of the urinary bladder; and the victim was alive when these injuries were inflicted....The victim sustained numerous bruises to her upper arm, wrist, and leg from being grabbed. Furthermore, a woman's screams were heard in the vicinity at the time of the murder.

582 So. 2d at 611-612. Thus, not only did Gilliam not involve a beating death like that in the instant case, it involved a much more vicious attack than the one herein.

In addition to the cases cited in Appellant's initial brief, please see Halliwell v. State, 323 So. 2d 557 (Fla. 1975), and the recent case of Elam v. State, 19 Fla. L. Weekly S175 (Fla. April 7, 1994). Halliwell beat his victim's skull with a 19-inch breaker bar, "and then continued beating, bruising and cutting the [victim's] body with the metal bar after the first fatal injuries to the brain." 323 So. 2d at 561. This Court found Halliwell's conduct not to qualify as HAC. The Court must reach the same result as to Appellant.

Elam struck his victim with his fist, knocking him to the floor, then picked up a brick and struck him several times on the head, killing him. 19 Fla. L. Weekly at S175. Although the victim was bludgeoned and had defensive wounds, this Court rejected the trial court's finding that the killing was HAC. The medical examiner testified that the attack took place in a very short period of time, perhaps a half a minute to a minute, at the end of which the victim was unconscious. This Court noted that "[t]here was no prolonged suffering or anticipation of death." 19 Fla. L. Weekly at S176. Compare the facts in Elam with those in the instant case, where the medical examiner testified at Appellant's penalty phase that either of the two blows to the left side of the head of Margaret Torres could have rendered her unconscious almost immediately, and she would have died within seconds after the infliction of these injuries. (T 1364-1365, 1368) Even the implement used here, a concrete "splash stone," was similar to that used in Elam (a brick). There is no principled way to distinguish the two cases.[2]

[2] In Elam this Court also rejected the applicability of the "avoid arrest" aggravating circumstance, which is one of the factors at issue in Appellant's cause.

ISSUE VI

THE TRIAL COURT ERRED IN SENTENCING BRETT BOGLE TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

One of the cases relied upon by Appellee in support of its proportionality argument is Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992). (Brief of the Appellee, p. 29) However, in Waterhouse there were no mitigating circumstances. Here, the trial court found several mitigating factors [Appellant's impaired capacity, family background, alcohol and drug abuse, good conduct during trial, kindness to friends and kindness to his mother (R 264-266)], and there was additional mitigation that could have and should have been considered, as discussed in Appellant's initial brief at page 89.

In addition to the cases cited in Appellant's initial brief, please see Morgan v. State, 19 Fla. L. Weekly S290 (Fla. June 2, 1994). "Morgan was convicted of the brutal murder of a sixty-six-year-old woman....After entering her home, he crushed her skull with a crescent-wrench and a vase and stabbed her approximately sixty times. He also bit her breast and traumatized her genital area. Numerous defensive-type wounds were found on her hands." 19 Fla. L. Weekly at S290. Despite the viciousness of this killing, this Court vacated Morgan's sentence on proportionality grounds. The Court noted that a finding of HAC does not preclude a finding on appeal that the death sentence is disproportionate. 19 Fla. L. Weekly at S293.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Brett A. Bogle, renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 27th day of June, 1994.

Respectfully submitted,

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