IN THE SUPREME COURT OF FLORIDA

HENRY JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC14-990
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
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SUMMARY OF REPLY POINTS

Appellant stands on the arguments raised on each point in the Initial Brief, and replies only to certain matters raised by the State in its Answer Brief. Specifically, on Point One, Appellant replies to the argument concerning the Tennessee Supreme Court's misapprehension of certain facts, as well as a harmless error argument raised for the first time. On Points Three and Four, Appellant replies to note a recent change in decisional law, occurring since the earlier briefing in this matter.

REPLY TO POINT I

IN REPLY AND IN SUPPORT WHETHER THE TRIAL COURT BELOW ERRED IN RULING THAT EVIDENCE OF COLLATERAL CRIMES WAS ADMISSIBLE UNDER THE WILLIAMS RULE.

In its Answer Brief, the State acknowledges the persuasiveness of the Tennessee Supreme Court's analysis of the similar crime evidence (AB 59), but attempts to distinguish the same with one minor fact and an assertion that Florida law is significantly different on this point (AB 61-63). Appellant argues that both of these are not adequately supported, as the State suggests, so as to defeat the efficacy of Tennessee's ruling in *State v. Jones*, 2014 WL 4748118 (Tenn. Sept. 25, 2014).

First, much is made of the intermediate Tennessee court's note in passing that the case here in Florida involved an "unknown female" [AB 59-60]. Tennessee did not rely on that specific fact with any of the force attributed by the State - instead, it was just an observed fact, referring to the evidence that female DNA was found on the victim's penis. The fact that here, in the Florida trial below, the State offered the dubious explanation of Ms. Bello's liaisons with Harry Pope, and the transfer of DNA via a comforter due to poor motel cleanliness does not defeat the overall Tennessee findings. There is no reference, as the State

would imply, that the female was in any way directly involved in the murder. This difference is insignificant and does not, as the state argues, warrant ignoring the entirety of Tennessee's analysis. The important distinctions are all of the other, overall differences between the two alleged crimes as a whole, as delineated in the entire Tennessee ruling.

The State also seeks to place great weight on the self-serving testimony of Tevarus Young - first the live testimony before the Tennessee jury, then its recitation here in Florida through reading aloud the transcript of the same (AB 60). This neglects, however, the Tennessee record which, as specified by the Supreme Court, demonstrated that Young was an indicted co-defendant who was seeking benefit from his cooperation in his own sentencing, as discussed in their recitation of facts (*State v. Jones*, 2014 WL 4748118 at 17):

> On cross-examination, Young admitted that after being pulled over by Detective Reyes, he wanted to get rid of Mrs. James' rings because they tied him to the murder. Young denied that he kept Mrs. James' rings as "trophies," lied to the police as part of his "game," or falsely portrayed himself as the victim in order to avoid prosecution. He admitted, however, that he had initially lied to the police by stating that he, the Defendant, and Wesley Armstrong had gone to the James residence, where he waited in the car while the Defendant and Armstrong went inside. Young ultimately admitted that Armstrong had nothing to do with the murders. Young acknowledged that he had been charged with facilitation of first degree murder, and that he did not have a plea deal but hoped to receive leniency in exchange for testifying against the Defendant.

Further, as part of their ruling, Tennessee noted that Young was indeed an accomplice and charged as such (2014 WL 4748118, at 28):

> The State has not challenged the determination by the Court of Criminal Appeals that "Young's admitted participation in the offenses was sufficient to render him an accomplice in the murders of Mr. and Mrs. James." *Jones*, 2013 WL 1697611, at *44. We agree that Young's involvement qualifies him as an accomplice. The question before us, therefore, is whether Young's testimony was adequately corroborated by other evidence.

Thus, the State's argument here that the Tennessee Supreme Court misapprehended the testimony of Young is without merit. Neither is it a core of their decision - the physical evidence and expert testimony was far more important to the ruling. Specifically, when presented with the same witnesses as in the trial here below, that Court observed that little evidence of "uniqueness" was presented, and indeed, State witnesses noted the injuries to be common to the type of crime (2014 WL 4748118, at 33-34):

> Moreover, the applicable standard focuses on the distinctiveness of the crimes, not a mere assessment of similarities or an existence of rarity. State v. Roberson, 846 S.W.2d 278, 280 (Tenn. Crim. App. 1992) ("[M]ere similarity in the manner in which two crimes are committed does not produce the relevance necessary for admission—uniqueness does." (emphasis added)). During the Rule 404(b) hearing, Dr. Smith unequivocally rejected all indications that the methodology of the murders was unique or distinctive. Specifically, on cross-examination, he testified as follows:
>
> > Q: So, death by slashing the throat has become not unusual. Correct?

A: That's correct.
Q: What about asphyxiation by possible strangulation. Is that unusual?
A: No, sir. That's probably a little bit more common than throat cutting.
Q: What about the two of those combined. Is that unusual?
A: No.
Q: Bondage. . . . Is bondage unusual?
A: No.
. . . .
Q: What about the three of those combined. Is that unusual?
A: No.
. . . .
Q: So [the bindings on Mr. James] had been removed?
A: Yes, sir.
Q: Is that unusual?
A: No.

Defense counsel then questioned Dr. Smith about the multiple lacerations to the neck:

Q: . . . Is there anything unusual at first glance to these—in the autopsy as far
as the incised wounds, anything out of the ordinary that you would see in this
sort of homicide?
A: No.
Q: Was there an efficiency to the incised wounds in any way that would
indicate any sort of training or technique?
A: No.
. . . .
Q: So four strokes across the same part of [Mr. James'] neck in layman's
terms?

> A: Yes, sir.
> Q: But that's not unusual?
> A: No.
> Q: Okay. Can you explain?
> A: Well, in the absence of a surgical instrument, cutting or incising the skin with a knife is very inefficient. . . . And when the cutting edge is applied to the skin surface and then dragged across, the skin is going to move and you lose the power of the knife so that it's more common than not to see a—an incised wound may first open up the skin and then as the knife is reapplied in a slightly different area, it goes into the—cuts its way into the already open area from the first or prior incision, and then once it gains access to the deeper tissues, it cuts with more efficiency. . . . To find a single application of a knife in a throat
> cutting incident would be unusual.

* *

> Although Dr. Smith conceded that the number of murders involving incisions, bondage, strangulation, bindings removed, and cleaning of the crime scene constituted a minority of all of the murders in Shelby County, he explained that there was nothing unusual about the methods employed—even in combination. Moreover, as Judge McMullen pointed out in her dissent, not all of the victims were found lying face down, as the trial court mistakenly observed.

This goes directly to the State's arguments here that the evidence of the Jones's murders was admissible in this trial because it established "a sufficiently unusual pattern of criminal activity", citing *Chandler v. State*, 442 So. 2d 171 (Fla. 1983), and *Crump v. State*, 622 So. 2d 963 (Fla.1993) (AB 62). *Chandler* and *Crump* are not controlling here, and do not contradict the Tennessee analysis -

instead, both States' decisional law fit together because the evolution of both are in parallel, not divergent. Without restating earlier arguments or belaboring the many cases cited by Tennessee in its decision, Appellant argues that both states have precedent in which other crimes where were deemed sufficiently similar to be admissible, and conversely, precedent in which adequate similarity was not shown and the evidence was excluded. When these are compared in light of the facts in this case, the dissimilarities simply outweigh the similarities here, as was likewise found by the Tennessee Supreme Court.

Harmless Error.

As part of its argument on this point, the State claims that error, if any, concerning the collateral crimes evidence was harmless (AB 66-68). Appellant refutes this position and asserts that the State cannot meet its burden of showing beyond a reasonable doubt that such evidence did not affect the verdict.

In *Robertson v. State*, 829 So. 2d 901, 913-14 (Fla. 2002), this Court held:

> Finally, we address whether the admission of this collateral-crime evidence constitutes reversible error. This Court has held that the erroneous admission of irrelevant collateral crimes evidence "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." *Castro v. State*, 547 So.2d 111, 115 (Fla.1989) (quoting *Straight v. State*, 397 So.2d 903, 908 (Fla.1981)); accord *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990) (holding collateral crime evidence that defendant was an escaped convict was

> presumptively harmful). In this case, given the highly inflammatory nature of Robertson's ex-wife's testimony and the emphasis placed on it by the prosecutor in closing argument, the State is unable to establish beyond a reasonable doubt and we are unable to conclude that the admission of this collateral-crime evidence constituted harmless error. Accordingly, we quash the decision of the Third District and remand for a new trial consistent with this opinion.

Likewise, more recently in *Vice v. State*, 39 So. 3d 352, 355 (Fla. 1st DCA 2010), the First District held:

> "A trial court's decision to admit collateral crime or *Williams* rule evidence is reviewed for an abuse of discretion. However, '[t]he admission of improper collateral crime evidence is presumed harmful error because of the danger that a jury will take the bad character or propensity to commit the crime as evidence of guilt of the crime charged.' For the harmless error rule to apply, the State must prove that there is "'no reasonable possibility that the error contributed to the conviction.'" *Henrion v. State*, 895 So.2d 1213, 1216 (Fla. 2d DCA 2005) (citations omitted).

Here, the facts as summarized by the State do not show overwhelming proof or beyond a reasonable doubt. To the contrary, no witness identified the Appellant at the scene - descriptions of him and his vehicle were only vague, and in some instances did not match. Further, whereas the low-percentage results of mitochondrial DNA could not exclude him as a donor on a hair, the experts admitted that no full DNA or other forensic evidence proved him to be the killer, and even the footprint expert could not make a positive, identifying match. Thus, while perhaps strongly circumstantial, the case wholly lacks the kind of

overwhelming evidence which would excuse the improper admission of something so serious as collateral crime evidence of other murders.

REPLY TO POINTS III AND IV

IN REPLY AND IN SUPPORT WHETHER A TRIAL COURT SHOULD BE REQUIRED TO APPOINT SPECIAL COUNSEL TO PRESENT MITIGATION EVIDENCE WHEN A DEFENDANT WAIVES THE PRESENTATION OF MITIGATING EVIDENCE.

IN REPLY AND IN SUPPORT WHETHER THE TRIAL COURT ERRED BY NOT APPOINTING SPECIAL COUNSEL TO PRESENT MITIGATION EVIDENCE TO THE JURY DURING APPELLANT'S PENALTY PHASE.

With respect to these two Points concerning the appointment of special counsel to present mitigation on behalf of the court in instances where defendants either choose to forgo or oppose the same, Appellant replies herein only to point out the very recent development on this issue arising since the earlier briefing. Contrary to the State's accusation of "judicial activism" (AB 75), the evolution of a sound, reliable and efficient process of reaching a just result is the ongoing quest of this Court. Established systems and procedures can and do change for the better, often in response to awareness raised through advocacy.

Appellant's plea and arguments in support thereof were recently borne out in *Marquardt v. State*, --- So.3d ----, 2015 WL 268111, 40 Fla. L. Weekly S32, (Fla. January 22, 2015). There, this Honorable Court receded in part from, and

modified the holding of *Mohammad v. State*, 782 So. 2d 343 (Fla. 2001), holding (2015 WL 268111, at 22):

> Nevertheless, while no error occurred, we recognize the tension that may exist when standby counsel is appointed by the trial court, even as an "officer of the court" and not as counsel for the defendant, to assist the court in its consideration of mitigation evidence. *Muhammad*, 782 So.2d at 364 & n. 15. In order to avoid any appearance or potential of a conflict of interest, and to foster uniformity in the procedures to be followed in all cases where the defendant waives mitigation, we take this opportunity to prospectively modify *Muhammad* in one important respect.
>
> Rather than utilizing standby counsel to present mitigation, the trial court should appoint an independent, special counsel to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court, in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases. This procedure will ensure that all available mitigation evidence is placed in the record at the time of the original sentencing proceeding, but will not prevent the defendant himself or herself from arguing in favor of the death penalty. We therefore recede from *Muhammad* to the extent we stated that the trial court could utilize standby counsel to present mitigation. See *Muhammad*, 782 So.2d at 364 ("[T]he trial court has the discretion ... to utilize standby counsel for th[e] limited purpose [of presenting mitigation].").

By its clear language, *Marquardt* is to be applied prospectively only and does not, of itself, require reversal in this case. However, should this Appellant be retried on either the guilt and/or penalty phase based upon the other errors

complained of, such prospective application would be available to him, and the cause of justice would be better served.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse the conviction below, remand for new trial, and/or order a new penalty phase hearing.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, capapp@myfloridalegal.com and mailed to, Henry Lee Jones, #14136391, Shelby County Jail, 201 Poplar Avenue, Memphis, TN 38103, on this 9th day of February, 2015.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

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