IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,	:	
Appellant,	:	
vs.	:	Case No. SC18-42
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Smith's convictions for capital offenses will survive the issues put forth in the postconviction process. This Court has not hesitated to allow oral argument on other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Smith.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are in the form (ROA. 123). References to the postconviction record on appeal are in the form (PC-ROA. 123). Generally, Delmer Smith is referred to as Mr. Smith, or the Appellant where necessary to distinguish him from his father of the same name.

STATEMENT OF THE CASE

Delmer Smith, Appellant, was charged by indictment in Manatee County with first degree murder of Kathleen Briles allegedly committed on August 3, 2009, in violation of sections 782.04 and 777.011 Fla. Stat. (2009). (1/26) On June 25, 2012, Appellant filed a motion to bar imposition of death sentence on grounds that Florida's capital sentencing procedure is unconstitutional under *Ring v. Arizona*. (ROA 205-

216,). This motion was denied on July 26, 2012. (ROA 230, 231)

Appellant and the State filed motions for continuance. (ROA 3133-3138, 3143-3146) The State indicated defense counsel had not deposed a majority of state witnesses including the crime scene technicians and medical examiner. (ROA 884, 887) About a week before the hearing, defense counsel (Hernandez) learned that the State's finger print expert had checked fingerprints on every page of the medical journal. Hernandez wanted time to hire a fingerprint expert to do a fingerprint evaluation of the medical encyclopedia. (ROA 890) The State (Iten) argued additional cell phone records were to be used to rebut a claim that someone other than Smith used the cell phone. None of the people the State would use for this purpose had been deposed. (ROA 886, 887) As additional grounds for a continuance Hernandez asked for time to depose the medical examiner and some of the other witnesses. (ROA 911, 912) The trial court denied the motion for continuance on July 26, 2012, but ordered the state to make the medical examiner and Joshua Hull available for deposition. (ROA 912, 913; 3147-3150)

Appellant filed an amended motion for continuance so his request to hire a fingerprint expert would be reduced to writing. The State fingerprint expert found no positive comparison of any federal prisoner's fingerprints on the medical encyclopedia. Hernandez did not receive the results from the State's fingerprint expert until near the time of the motion for continuance filed on July 20, 2012. When Smith learned the fingerprint results, he requested for Hernandez to have a defense expert examine the medical encyclopedia. (ROA 917, 3151-3155) On July 30, 2012,

Hernandez argued it would be ineffective assistance of counsel if they did not have their own fingerprint expert examine the medical encyclopedia. It was the defense position that the medical encyclopedia, claimed to have come from the Briles residence, actually come from federal prison and fingerprints of federal inmates on the book would substantiate the defense theory. Counsel also renewed his other arguments for a continuance. (ROA 918, 919)

Apparently, the prosecutor was aware of the defense theory because he had his fingerprint expert compare the prints of federal inmate Alex Ramos using facsimile prints and no additional identification was made. The expert was awaiting arrival of mailed prints to confirm his findings. Iten agreed that if a federal inmate's prints appeared on the medical encyclopedia, it would be exculpatory evidence because there were no prints of any members of the Briles family on the medical encyclopedia. There were some palm prints discovered in the medical encyclopedia and they did not have Ramos' palm prints. (ROA 919-921) The trial court denied the motion for continuance stating: "I think if the Defense had been concerned about the unreliability of the State's appraisal of the evidence it could have asked for a fingerprint expert over these past couple of years." (ROA 922) Hernandez asked to be able to make arrangements to have Alex Ramos, a federal prisoner, testify. (ROA 924) Hernandez asked the court to consider that as an additional ground for continuance. The motion for continuance was denied. (ROA 925)

On July 5, 2012, the State filed a notice of intent to use evidence of other crimes, wrongs, or acts committed by the defendant (threats to James Cellecz), pursuant to

Section 90.404(2), Florida Statutes (2011). The motion alleged that Smith knowingly used intimidation or physical force, or threatened another person, with the intent to cause or induce James Cellecz to withhold testimony from an official proceeding, to wit: a trial, contrary to Section 914.22(1)(a) Florida Statutes. The State intended to introduce this evidence of other crimes, wrongs, or acts as proof of Defendant's consciousness of guilt. (ROA 225, 226) The State's notice of intent to use evidence of other crimes, wrongs, or acts was granted on July 26, 2012. (ROA 269-271)

The case proceeded to jury trial commencing on July 30, 2012. (ROA 915) On August 9, 2012, the jury returned a verdict of guilty of murder in the first degree. (ROA 2652) The penalty phase commenced on August 14, 2009. (ROA 2661) After penalty phase, the jury returned a 12-0 recommendation of death. (ROA 2845) Defense counsel filed a motion for appointment of mental health expert for the purpose of interpretation of the quantitative analysis of defendant's MRI and PET scan. (ROA 358-360).

A Spencer hearing was conducted on April 19, 2013. Dr. Gur, a clinical psychologist professor in the Department of Psychiatry at the University of Pennsylvania, had MRI and PET scan testing done locally on Delmer Smith based on parameters he and his team specified. (ROA 2983-2988) Mr. Smith's MRI showed quite extensive frontal lobe damage which is clearly abnormal. (ROA 3011-3013, 3015) Other areas of his brain also show brain damage which seems to have been there for quite some time. (ROA 3013, 3014) From the PET scan images for Smith, Dr. Gur concluded that his thinking brain is hyperactive at the resting state and shuts down

when it actually needs to perform a task. This looks to be consistent with traumatic brain injury. (ROA 3018-3022) In mild to moderate traumatic brain injuries the scans are read by a radiologist as normal. (ROA 3054)

Dr. Eisenstein previously testified at the penalty phase of the jury trial. Eisenstein had testified that Smith had unequivocal brain damage. He clearly falls within the significantly impaired range of brain damage. (ROA 3060, 3061) Dr. Eisenstein reviewed Dr. Gur's report and met with him again the day before the Spencer hearing to see if there were any changes in the last eight or nine months. Eisenstein did not do any additional testing. Throughout his life Smith has had a very primitive amygdale melt-down response. He has had an inability to respond appropriately to high-stress situations, and the inability to walk away from those situations. From an early age, situations have occurred which presented challenging situations to Smith's brain capacity, or lack thereof, to control and inhibit those type of behaviors. This inability to control his behavior was evident in an incident at age 14, when he was accused of raping a 40 year-old woman, and years later when committing a bank robbery. This behavior suggests that the brain damage was present a long time before the motorcycle accident on July 10, 2009. School records reflect that Smith had all sorts of issues with cognitive intellectual impairment. (ROA 3061-3065)

Smith has shown that he presents no problems in a structured setting. He has continuously taken care of himself by exercising and cleaning the pod. He has been institutionalized in a prison setting. He causes no harm. He is not a danger to anyone else ina prison setting. Smith wants to present himself as healthy and as normal as possible. He wanted to give his family sound advice. Unfortunately, he has not been able to take his own sound advice. He has never dealt effectively with what has happened to him and how he can modify his behavior, other than when controls are put on him from outside. Internally, his own resources are totally lacking. This explains why he has failed so miserably in the outside environment, but he does so well in a controlled environment. Smith's response which is totally inappropriate in highly charged stress situations is not volitional because it is an inability to control. (ROA 3065-3067)

State witness Helen Mayberg, professor of psychiatry, neurology, and radiology at Emory University School of Medicine, testified that a PET scan is worthless as a general screening test. It is not used in medicine, neurology, or psychiatry as a general screen to know if something is wrong with the brain. The pattern of brain metabolism in people at rest can be influenced by the level of anxiety that is present. People that have an anxiety disorder can have resting-state PET scan abnormalities. A PET scan looks at the functioning of the brain. (ROA 3072, 3087-3089) It is not generally accepted in the medical community to use an MRI to diagnose a mental disorder.

Many things that are very wrong with a person may not have something that's seen on the scan. (ROA 3089)

Smith's medical records indicate he was complaining of anxiety in weeks leading up to his PET scan. Mayberg did not review a psychiatric exam, diagnosis, or treatment plan, for Smith's anxiety but only that it was noted in his records. Mayberg reviewed the MRI and PET scan images done of Smith. Mayberg's visual inspection, without having Dr. Gur's interpretation of the PET scan, revealed that it was normal looking. Even after reviewing the PET scan with Dr. Gur's findings, Mayberg was not seeing the abnormalities in the findings. However, Mayberg was not comparing the scan to her normal controls or to Gur's normal controls. (ROA 3099, 3100)

Mayberg reviewed the MRI and did see the lesion identifiedby the radiologist. There is a small area in the white matter high in the brain toward the front. It is the kind of thing you see in people with high blood pressure. Smith has high blood pressure in his history. Otherwise the scan is normal. Mayberg would not describe anything she saw on the MRI or PET scan as brain damage. (ROA 3100-3102) Mayberg did not see Eisenstein's raw testing neuropsychological data. (ROA 3118)

A written sentencing order was filed on May 28, 2013, along with the judgment and sentence imposing death. The trial court found the following statutory aggravators: 1) The capital felony was committed by a person previously convicted of a felony and on felony probation (moderate weight). 2) The Defendant was previously convicted of a felony involving the use or threat of violence to the person (great weight). 3) The capital felony was committed while the Defendant was engaged in the commission of

a burglary (moderate weight). 4) The capital felony was committed for financial gain (merged with 3 and given no weight.) 5) The capital felony was especially heinous, atrocious, or cruel (great weight).

The court found the following two statutory mitigators were not proven: 1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. 2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The court considered the following non-statutory mitigating factors: 1) Mr. Smith has traumatic brain injury and frontal lobe damage (not established). 2) Mr. Smith has intermittent explosive disorder (moderate weight). 3) Mr. Smith's loving relationship with his nieces (little weight). 4) Mr. Smith's physical, emotional, and sexual abuse as a child (little weight). 5) Mr. Smith's acute academic failure and attention deficit disorder as a child (significant weight). 6) Remorse (not established). 7) Mr. Smith's good conduct while in custody (moderate weight). 8) Time jury deliberated on penalty (not proven). (ROA 441-455, 457-462)

Appellant filed a motion for new trial or alternatively new penalty phase based on newly discovered evidence on June 3, 2013. (ROA 467) The motion for new trial was denied. (ROA 643-648) Appellant filed his notice of appeal on July 26, 2013. (ROA 649, 650)

On July 15, 2015 this Court affirmed Mr. Smith's conviction and death sentence. *Smith v. State*, 170 So.3d 745 (Fla. 2015). The Office of the Capital Collateral Regional Counsel was appointed to represent Mr. Smith on August 5,

2015. (PC-ROA 3-4)

On October 2, 2015, Mr. Smith filed a Petition for Certiorari to the United States Supreme Court in Case. No. SC13-1550. On January 25, 2016 the Court denied the Petition and on March 21, 2016 denied a motion for rehearing.

On January 23, 2017, Mr. Smith timely filed a Motion for Post-Conviction Relief in the lower court. (PC-ROA 202-235). The claims raised in the motion were: (1) Mr. Smith's trial counsel was ineffective for failing to file a motion to suppress evidence the police found as the result of an illegal search and seizure of items found in a duffle bag that belonged to Mr. Smith. Had counsel timely filed a proper motion to suppress the state would not have been able to use at trial the medical textbook, coins, a Minnie Mouse key chain, a gold colored lock, and a men's Geneva watch. (PC-ROA 203); (2) Trial counsel was ineffective for failing to timely file and argue a motion to suppress evidence collected by law enforcement via an unconstitutional warrantless search and seizure of the contents of Mr. Smith's cell phone. (PC-ROA 207); (3) The opinion of the United States Supreme Court in *Riley v. California*, 134 S. Ct. 2475, 189 L.Ed 430 (U.S 2014), holding that law enforcement officers must obtain a warrant before securing a criminal defendant's cell phone, applies retroactively to Mr. Smith's case and requires that this Court grant him a new trial (PC-ROA 211); (4) Counsel for Mr. Smith was ineffective for failing to hire an expert witness in the area of tracking of cell phones and cell phone towers to counter the state's expert at trial who provided inaccurate and forensically unsound opinions to the jury as to the tracking of Mr. Smith's cell phone on the day of the homicide.

(PC-ROA 213); (5) Counsel was ineffective in waiving the right to cross examine James Cellecz concerning the 35 counts of child pornography for which there were withholds of adjudication and for failing to cross examine him about his violations of probation for failing to register as a sex offender. (PC-ROA 216); (6) Counsel was ineffective in the penalty phase for failing to conduct a complete investigation of available mitigating circumstances for presentation at the penalty phase of the trial (PC-ROA 217); (7) In light of Hurst, the defendant's death sentence violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution. (PC-ROA 224)

On October 2nd and 3rd of 2017, the lower court conducted an evidentiary hearing on all claims requested by Mr. Smith. (PC-ROA 238 – 492). On December 12, 2017, following written closing arguments, the lower court entered an order denying al the claims raised in Mr. Smith's post-conviction motion. (PC-ROA 704-924). On January 9, 2018, Mr. Smith timely filed a Notice of Appeal. (PC-ROA 925-926). This Initial Brief follows in accordance with the briefing schedule ordered by this Court.

GUILT PHASE

Kathleen Briles stopped at 7-Eleven on August 3, 2009, about 2 p.m. to visit her friend Kristie Gish. Gish noticed that Briles was wearing a watch which appeared to be the same watch as State exhibit LD-1. (ROA 1949-1951, 1953) Video surveillance from Publix in Palmetto showed Briles exit the store at 3:36 p.m. with a

cart full of groceries and go to her car. The car left the parkinglot a couple of minutes later. (ROA 1959, 1960, 1964)

Dr. James Briles, the husband of Kathleen Briles, was working on August 3, 2009. The last contact Dr. Briles had with Kathleen Briles was a mid-day phone call when everything was fine. They had a carpenter working at the house daily. The carpenter did not come that day. (ROA 1964, 1978) Dr. Briles left his office around 6:30 to do rounds at Manatee Hospital. (ROA 1964) James Briles headed home around 7:30 p.m. and found Kathleen's car parked in his normal spot. James had to use his key to unlock the back door to enter the house. After turning on the kitchen light, James realized Kathleen was lying on her stomach, with her hands bound behind her back in duct tape, her ankles wrapped in duct tape, and a gag around her face. She was cold and not breathing. She had no pulse and her face was deformed. Dr. Briles knew she was dead. (ROA1970-1972) It was stipulated that the victim was Kathleen Briles. (ROA 2141)

A cast iron antique Singer sewing machine, normally in the study closet, was on the floor behind her head. There was blood from her head to the wall. Dr. Briles called 911 and stayed on the line with the operator until the deputies arrived. (ROA 1973- 1979, 1992, 1993) Dr. Briles exited the house out the front door, which had been locked. (ROA 2003)

The furniture was disheveled, and the normally open blinds were closed. ROA 1982) Photographs of the scene were admitted into evidence. (ROA 1981-1985, 1990, 1992, 1993) The bed in the master bedroom was messed up and several items were on the floor. Things were out of order, drawers were open. (ROA 1985-1987) A jewelry case and box that Ms. Briles kept fine items in should have been full of jewelry. (ROA 1989) Closet doors and drawers that were normally closed were open. (ROA 1991, 1992) Blood was on the rocking chair, loveseat, and the floor behind the loveseat. The rocking chair was moved, and Kathleen's glasses were on the floor by the rocking chair. There were scratches and dents on the wall and floor. (ROA 2005, 2006)

The door of the shed in the back of the house, normally closed, was open. The shed had been entered, drawers were open and gray duct tape was missing. (ROA 1994, 1995) Most of Kathleen's jewelry, including her wedding ring that was on her hand, was missing. Diamond necklaces, gold necklaces, silver necklaces, wrist watches, and rings valued at $30,000 to $40,000 were missing. Law enforcement later showed a necklace to James that was a diamond baguette necklace he bought for his wife many years ago. (ROA 1996, 1997) Kathleen carried her house keys and car keys on two separate key rings. Her house keys were on a Minnie Mouse key chain, but most recently the Minnie Mouse key chain was in her top drawer in the master closet. James had given Kathleen the Minnie Mouse key chain for their anniversary in June of 2009. (ROA 1998, 1999)

Dr. Briles recognized State's exhibit JJ-4 as a padlock keyhole that was in a

wooden coin caddy in his bedroom closet. Exhibit JJ-2 was a special set of nickels given to Dr. Briles by a patient. (ROA 2001) Dr. Briles looked for Kathleen's keys and found them just two weeks before the trial when he was raking leaves near the shed. (ROA 2002) Kathleen gave James a watch with a gold and silver band, but he did not wear the watch. Exhibit AW-62 was a medical encyclopedia that James believed his wife got at a yard sale. James never used the book. His son Calvin Briles borrowed the medical encyclopedia in May of 2007 and returned it in May of 2009 before Kathleen was killed. The corners of the book did not line up, and the cover used to return to a particular position but no longer did so because it had been manipulated so much. (ROA 2003, 2004, 2264-2267) Exhibit PP-99 was a picture of the medical book on the bottom shelf. (ROA 2005)

Deputy Andrew Hasty of the Manatee County Sheriff's Office was the first deputy to arrive at the Briles' residence on August 3, 2009. (ROA 2009, 2010) Dr. Briles' hands and shirt were covered in blood. Dr. Briles was in shock, and white as a ghost. He kept repeating, "She's dead." (ROA 2011) Hasty went into the house with Deputy Byington and cleared the house room by room to make sure no perpetrator was there. Hasty did not see anyone in the house other than Mrs. Briles on the living room floor. She was lying face up in front of the couch. Her arms were underneath her behind her back and her legs were straight out. Hasty could tell Mrs. Briles was dead just by looking at her. (ROA 2012) There was a lot of blood; some dry and some

wet. Hasty secured the scene. (ROA 2013)

Crime scene technician Adriana Walls was in charge of documenting Kathleen Briles' position and assisting with the investigation. Photographs of the crime scene, including photographs of the body and sewing machine, were admitted into evidence. (ROA 2027-2032) The sewing machine was admitted into evidence. (ROA 2036, 2040)

Richard Talbot, crime scene unit manager, arrived at the crime scene about 8:55. Talbot saw a female's purse and a Publix receipt on the front passenger seat of a gold Oldsmobile Intrigue. (ROA 2041-2044) There were grocery bags containing cold food from Publix in the trunk of the car. The receipt and photographs were admitted into evidence. (ROA 2045-2047)

Talbot entered the house about 10:40 that night. Talbot saw the body and the largest volume of blood around the head, neck and chest area. The most outstanding object near the body was the steel sewing machine on the floor. There appeared to be blood on the sewing machine. (ROA 2048, 2049) Talbot did blood spatter analysis and determined that the impact blood stains were from an area of origin low to the ground. The round type stains on the couch were consistent with Kathleen Briles being close to the ground when struck. (ROA 2053-2055)

Talbot had contact with and took some photographs of Dr. Briles. Dr. Briles had blood on his hands and some blood on his tie. Talbot did not see any fresh bruises or lacerations on Dr. Briles. (ROA 2055, 2056)

The owner of Roadkill Auto, Inc., sold a tan Blazer and a red Hyundai to Delmer Smith in 2009. Smith traded the Blazer in for the red Hyundai on August 31, 2009. (ROA 2287-2290) Detective Kumiko Carter of the Manatee County Sheriff's Office located the tan Blazer in January of 2010. (ROA 2290-2294) Talbot and Walsh processed the Chevy Blazer on January 25, 2010. They did not find any blood stains in that vehicle. Three days later they did luminol testing for blood on the vehicle. There were areas that luminesced but they all tested negative for blood. (ROA 2056-2058)

Crime scene technician Grace Givens attended the autopsy of Kathleen Briles performed by Dr. Broussard on August 4, 2009. The only jewelry Givens observed on Briles was earrings. (ROA 2060- 2063) Dr. Broussard cut off the duct tape that was on Briles' neck, wrists, and ankles. Givens photographed and bagged each section of duct tape that was cut off. Swabs were taken off the wrists and ankles of Briles. (ROA 2064, 2065) Several days later Givens attempted to lift latent prints off the duct tape. Givens took photos of the ridge detail found on the outside of the duct tape from her wrists. (ROA 2067-2070) The blood on Kathleen Briles' right breast and upper right leg was consistent with transfer from five fingers of a hand. (ROA 2071) The jury was allowed to view and lift the sewing machine to feel its weight. (ROA 2074)

Crime scene technician Hurly Smith and Detective Foy went to Intertape in South Carolina to video how duct tape is made, because there was an unexplained fingerprint on recovered duct tape. (ROA 2075; ROA 2312, 2316) Oliver Young, the product manager of Intertape Polymer Group, is familiar with the duct tape manufacturing process. There are other plants that produce duct tape. Young was not

aware of any significant variations between plants in how duct tape is manufactured. During the manufacturing process, ungloved hands come into contact with the duct tape. (ROA 2078, 2079) A person manually manipulates the strip of tape to get the roll started. (ROA 2084) Ungloved hands will come into contact with the tape using the automated converter. (ROA 2085, 2086) Employees' fingerprints could be at the beginning where they start a roll or it could be midsection. They could have their hands on the tape anywhere in the process. The actual fingerprint handling of the tape is the very beginning of the roll. (ROA 2089)

The medical examiner, Dr. Broussard, arrived at the scene of the homicide at 10:20 p.m. on August 3, 2009. (ROA 2097) Broussard saw the sewing machine near the body. Broussard later determined the sewing machine to weigh 23 pounds. Broussard observed Briles' hands duct taped behind her back and her ankles were bound in duct tape. (ROA 2098) Rigor mortis was present in Briles' extremities when Broussard examined her at 12:20, about two hours after he arrived. (ROA 2099) The house was 80 degrees inside and Broussard felt no appreciable warmth at the underarm of Briles' body. (ROA 2100) Broussard determined that the death occurred somewhere between approximately noon and 7 or 8 p.m. (ROA 2101)

Broussard conducted the autopsy on the morning of August 4, 2009. Photographs were taken during the autopsy and used during Broussard's testimony. (ROA 2101, 2104) Briles was 5'3" and 142 pounds. Broussard observed multiple injuries on Briles. (ROA 2102) Broussard believed that Briles was alive when she bound with duct tape. (ROA 2107) There was purple bruising around the elbow that

was typical of an injury before death and likely occurred near the time of death. (ROA 2108-2110)

There was a laceration above the left eyebrow and areas of contusion and slight abrasion. There was another abrasion on the tip of the nose consistent with having occurred while alive. The most likely scenario for injuries above the eyebrow is that they occurred while face down sustaining several blows to the back of the head. The jaw was fractured on the right and left sides. (ROA 2111, 2112) There were a couple of areas of one to three inch abrasions on the back of the upper neck and shoulder region. (ROA 2114) The injuries to the right side of the head were consistent with being struck directly with the sewing machine a minimum of four to five times. A minimum of four to five blows caused the Y shaped laceration in the back of the head. A single blow caused another head injury. (ROA 2117-2119)

There was a five to six centimeter laceration to the liver. The 500 millimeters of liquid blood present indicates the liver was injured while Briles' heart was still beating. (ROA 2120, 2121) There was no external injury that corresponded to the lacerated liver. Something blunt like a kick or knee to the abdomen caused the liver injury. The impact of this injury alone would not have caused loss of consciousness. (ROA 2122)

Broussard determined Briles was face down on the floor while being struck with the sewing machine several times. The scalp was lacerated several times causing her

to bleed extensively. There was no blood on the tape, so it appeared more consistent with her being bound prior to being struck. There was blood on the tape around the face. (ROA 2129) Broussard could not determine which blow came first or which blow caused the death. The first blow could have caused the death, if it was a major blow, or it could have been a combination of several blows. There is no way to tell how long the victim was conscious after the first blow. (ROA 2130) The cause of death was multiple blunt force head trauma. (ROA 2131) It was stipulated that no DNA of Kathleen Briles was discovered by laboratory analysis on items taken into custody that were in the possession of Martha Tejeda, Michelle Quinones, and Pawn Star. No DNA of Delmer Smith was detected by laboratory analysis done in this case. (ROA 2141, 2142)

Martha Tejeda knew Delmer Smith by the name Dee. They were more than friends. In August and September of 2009, Tejeda lived at 3712 Bobko Circle in North Port, Florida. Smith lived with Michelle Quinones about three houses away from Tejeda. In September of 2009, Smith drove a red car and before that a Blazer SUV. After Smith went to jail, he called Tejeda and asked her to get some of his property, including a big duffle bag, from storage. Tejeda listened to the recordings of the jail phone calls and identified Smith's voice in the calls. The recorded phone calls were admitted into evidence and published to the jury. (ROA 2156, 2160, 2172)

During the phone call of 9/11/09 at 2038 hours, Smith told Tejeda that he needed her to go to his storage and get all his duffle bags. His clothes and stuff were in the bags. He later told her to open the bags and take the one containing his clothes. Smith told her she could go back later and get the rest of his stuff. The storage unit was paid up for three months, so they had time to get the rest of the items out of the unit. (ROA 2174,2175, 2178)

Smith spoke to Tejeda again that day at 2222 hours. Smith told Tejeda to take all the bags tomorrow. He said there was a small laptop in one of the bags. There is something inside one of the bags and it was very important that she get it out the next day. (ROA 2198)

The next call was 9/12/09 at 11:34 hours. (ROA 2201) Smith told Tejeda that she needed to pick up the car that day. (ROA 2202) Next call was at 1539 hours. (ROA 2205) Tejeda had picked up his dogs and was going to go to the storage. Smith told her he would call her back in one hour when she was at the storage unit so he could tell her what he needed her to get. (ROA 2207) Smith called back at 1620 hours. Tejeda was at the front door of the storage unit. Smith guided her to the second red box on the wall. (ROA 2210, 2212-2214) Tejeda saw the bags. Smith told her to take all the bags but she needed to open the big bag herself. Smith told her to take the bag to the house.(ROA 2215-2217)

Smith called back at 1651 hours. (ROA 2218) Tejeda told Smith she took everything. (ROA 2218) The last call was on 9/15/09 at 2011 hours. (ROA 2219) Tejeda told Smith she was going to the police because they were coming for her. She

said the police were there and took a picture of Smith's car. Smith told Tejeda that she never got anything out of his storage and that she didn't know anything about that. (ROA 2220-2222)

Tejeda retrieved the big duffle bag from storage and put it in her attic. A photo of the bag and its contents was admitted into evidence. Tejeda looked inside the bag and saw a lock box. (ROA 2161, 2162) Tejeda brought Smith's car to her house and put it in her garage. She never cleaned the car out or took anything out of the car. Tejeda saw the blue medical encyclopedia among Smith's property. (ROA 2163, 2164) After Tejeda took items from the storage shed to her house, the police came to her house and took all of the property belonging to Mr. Smith out of the attic. Tejeda gave the car to the police the first time they came. (ROA 2154, 2165) There were no clothes in the big red bag. (ROA 2166) Smith told Tejeda that he bought the electronic items that were in storage at a pawn shop.

Jessica Jarecki, a crime scene technician for Sarasota County Sheriff's Office, and her co-worker Jessica Henderson went to Tejeda's house in North Port on September 16, 2009. Henderson went into the attic of the house and removed containers and bags. (ROA 2224, 2225, 2226, 2240) Photos of the contents of the red bag were admitted into evidence. (ROA 2229) There was a Honeywell safe in the bag. (ROA 2229) Inside the safe was a coin collection in a plastic container, a Minnie Mouse keychain with keys, a golden color lock, and a watch. (ROA 2230, 2231) The items that came out of the Honeywell safe were admitted into evidence. (ROA 2233)

Walls processed the cover and every page of the medical encyclopedia for fingerprints. (ROA 2033, 2034) Ridge detail of a fingerprint was found on page 1373 of the book. (ROA 2035) Walls took photographs of 12 different things from the medical encyclopedia she believed were fingerprints. (ROA 2038) Robert Feverston, a latent print examiner, compared Smiths prints to the latent lift from the medical encyclopedia (LL1) and determined that Smith's left index finger made the print. (ROA 2269, 2279, 2280) Feverston found no match of Smith's known prints with LL2, 3, 4, and 5, but that does not mean Smith is excluded. (ROA 2281) Feverston also ran and AFIS (Automated Fingerprint Identification System) search on LL2, 3, 4, and 5 but was unable to make an identification for those latent lifts. (ROA 2282, 2283) A total of ten unknown prints were lifted from the medical encyclopedia. Feverston compared those prints to a list of 89 people. None of the prints belonged to any member of the Briles family or James Cellecz. (ROA 2284, 2285)

Detective Ned Foy met with Dr. Briles and his son Calvin on November 2, 2009, to show them video from Publix and a BP Station to see if anything would jog their memory regarding the homicide. Foy showed pictures to James and Calvin Briles of a necklace that had been pawned in Manatee. (ROA 2297-2300)

Foy met with Calvin Briles on November 23, 2009, and showed him a photograph of the medical encyclopedia. (ROA 2301) On December 4, 2009, Foy retrieved the Minnie Mouse keychain and showed it to James Briles at his office.

(ROA 2301) Later in that month, Foy took the gold padlock clasp and a coin set to Dr. Briles office for him to view. Foy left and returned to Dr. Briles office that day after receiving messages on his answering machine. Foy met with Dr. Briles' nurse Marion Cleveland who produced a second set of Westward Journey Nickel Series boxed coins that were the same as the ones shown to Dr. Briles. (ROA 2302-2305)

In January of 2010, Foy determined the drive time from Publix to the Briles' residence in Terra Ceia was six and a half minutes. (ROA 2306) Foy did a forensic examination on the tan Blazer and found that all the keys on the Minnie Mouse keychain unlocked the doors and started the motor on the vehicle. Some of the keys were stamped North Port Lock and Key. Foy went there on January 26, 2010, and presented Stanley Grubbs, the business owner, a photo pack with Smith in position number 6. (ROA 2306-2310, 2323- 2325) Grubbs selected photograph number 6. Smith tried to sell some gold to Grubbs and Grubbs sent Smith to North Port Jewelry. (ROA 2311, 2325, 2326)

On March 18, 2010, Foy received from Detective Linda Deniro a woman's Geneva watch that was recovered from the property and evidence section of the Sarasota Police Department. (ROA 2313, 2314) On April 15, 2010, Foy received a print photograph from Dr. Briles of a medical encyclopedia. (ROA 2314)

On May 3, 2010, Foy audio-recorded an interview he did with Joshua Hull, an inmate at the Manatee County Jail. (ROA 2315) Foy's agency acquired cell phone records and Detective Diamond assisted Foy in reviewing the cell phone records. (ROA 2315)

Michelle Quinones started dating Smith in October of 2008. Smith moved in with Quinones at the end of November 2008 at Bobko Circle in North Port, Florida. Smith lived with Quinones until August of 2009. Smith was working when he moved in with Quinones, but he was laid off in January of 2009. Smith purchased a champagne color Blazer when he was living with Quinones. (ROA 2327-2329)

Quinones knows James Cellecz. She did not remember ever getting James Cellecz when she called Smith's cell phone number. Quinones knew Cellecz for about a month when she was with Smith. Smith and Cellecz would exchange, trade, or sell items with each other. (ROA 2331, 2336, 2337) After Smith bought the Blazer, he gave Quinones a copy of keys on a Minnie Mouse keychain. Smith never said where he got the keychain. In the fall of 2009 Smith showed Quinones his-and-her watch set. Quinones was not very excited about the watch and she put it in her jewelry box. Quinones recognized exhibit LD1 as the watch Smith gave to her. In the fall of 2009, Quinones found a backpack in her garage that belonged to Smith. She later said the backpack was hers. There was a roll of silver duct tape in a mesh pocket that drew her attention to the backpack. The backpack contained a black hoodie, a black ski mask, screwdrivers, and pliers. (ROA 2331- 2333)

Smith was 5'11" and 260 pounds, solid muscle. He had a weight set on the lanai where he would work out. Smith left the house in August and never came back to live there. Quinones gave Detective Deniro some of Smith's property. Quinones put the watch in the pocket of a black jacket that belonged to Smith. She put the jacket

in a garbage bag and called Deniro to come pick it up. Quinones set the bag out for Deniro and Quinones was not homewhen the bag was picked up. Smith took all his other items with him when he moved out. Quinones never saw the black backpack again. (ROA 2334-2335) Deniro went to Quinones home on November 5, 2009, and picked up a white plastic bag that had a jacket in it. Inside the jacket pocket, Deniro found a razor telephone, a watch, and a keychain. The watch was the one that Smith gave to Quinones. (ROA 2340,2341)

Gerri Cotter worked for a federal government agency and had regular contact with Smith from February 2009 until July of 2009. She had been to Smith's home at 3729 Bobko Circle approximately each month. Smith lived with Michele Quinones. Smith's cell phone number was 941-592-0538. Cotter reached Smith many times calling that number. Smith was unemployed and seeking a job. (ROA 2343- 2345) Cotter was not familiar with James Cellecz. Cotter never dialed 592-0538 and reached anyone other than Smith. (ROA 2345, 2346)

Detective Jerome Diamond went to the Briles residence on Bayshore Drive and to 3712 Bobko Circle in North Port. After reviewing cell phone data, Diamond drove to see each individual cell phone tower that was on the list of where the cell phone connected to. There was a stipulation that the cell phone examined by Diamond was taken from Delmer Smith on September 10, 2009. The cell phone, using the number

941-592-0538, was admitted into evidence. (ROA 2362, 2370-2374)

Smith's cell phone had contact numbers saved for Bobby, David Kimbro, Flying Brain {sic} Bike, Gerri Cotter, Jack, Josh, K, Kim Neighbor, Kim Head, Michele, Martha, and Wes. (ROA 2375-2379) Metro PCS provided Diamond a printout of the cell identifier number that tells which cell tower and sector a call was connected to. (ROA 2380) Call detail records indicate actual in and out transactions when a cell phone connects to a tower. (ROA 2382, 2383) Diamond also received a list of text messages sent and received on Smith's phone on August 3, 2009. (ROA 2385)

The subscriber name for the phone is Delmer Smith and it was activated on February 21, 2009. The account was terminated on October 11, 2009. Delmer Smith was also the subscriber for 941-592-0528 during that timeframe. This account was started on April 16, 2009, and canceled on September 3, 2009. (ROA 2387-2389) Call detail records for the 0538 number showed calls beginning at 9:17 a.m. and ending at 11:42 p.m. on August 3, 2009. (ROA 2389) There are three antennas on each cell phone tower and the azimuth tells you what the angle the antenna is aligned on a 360 degree circle. (ROA 2398) On the tower located at 77 Street East, Palmetto, Florida, the three antennas are centered at 100 degrees, 195 degrees and 295 degrees. (ROA 2399) Diamond used a map to show connections the 0538 phone made with cell towers

on August 3, 2009 from 1316 hours to 1544 hours. (ROA 2402-2404) The records do not tell who is using the phone. It just indicates the phone is in use. (ROA 2405) At 2:34 p.m. the phone connected to a tower at 690 56 Street East in Bradenton. The next connection was at 3:44 p.m. to a cell phone tower 1.24 miles, as the crow flies, from the Briles residence. It would take longer to drive because there is no bridge over the bodies of water. (ROA 2407-2409) The phone could have been further from or closer to the Briles residence than 1.24 miles. (ROA 2434) The furthest tower connection you can get is seven to eight miles. (ROA 2440) The Briles residence is in sector 3 and the call at 1544 connected to sector 3. (ROA 2415, 2416) This was an incoming call from 941-266-9693 that lasted six seconds and was not answered. (ROA 2418)

The 0538 number made four phone calls to the 9693 number on August 3, 2009. (ROA 2421) There were calls between these two phones that were answered at 1139 and 1153. There were calls between these two phones at 1544, 1717, and 1944 that were not answered. The first call after 1544 between these two phones that was answered was at 2045. (ROA 2422-2424) The first call after 1544 that was answered came from 240-6812 at 1722 hours. (ROA 2437) There were also calls between the 0538 number and contacts listed as Jack, K, Bobby, and Wes. (ROA 2424-2428) The next time segments showing calls from the 0538 number was from 3:44 p.m. until 6:44 in the evening. There were ten connections to a tower at 15 Street East in Bradenton

from 1622 hours until 1722 hours. This location is south of 77 Street East. (ROA 2410-2412) The next connection is at 1824 hours with De Brita Road antenna which is very close to 3712 Bobko Circle, North Port, Florida. (ROA 2412)

Kimberly Osborne lived in North Port in August of 2009 and was a friend of Smith. (ROA 2441, 2442) Osborne's cell phone number then was 941-266-9693. Osborne did not remember ever calling Smith and having someone other than Smith answer the phone. (ROA 2444, 2445)

Prior to Joshua Hull being called as a witness defense counsel renewed his objection that Hull's testimony is extrinsic and should not be admitted. (ROA 2446) The court allowed defense to have a continuing objection as to the admissibility of Hull's testimony. (ROA 2447)

Joshua Hull, an inmate in Manatee County Jail, has eight felony convictions and had not been given a deal to testify in court. Hull saw Smith on the transport bus returning to county jail after he was sentenced in April of 2010. That is the first time Hull had contact with Smith. Hull was sitting directly in front of Smith on the bus. They began a conversation and Smith asked Hull where he was housed. Smith asked Hull if he knew inmate James Cellecz. Hull knew Cellecz from playing cards and walking around the dorm. Smith told Hull to tell Cellecz he had "something for his ass." Smith said, "Tell him I still know where Stephanie and Gavin are and I have

something for them." Smith said Stephanie and Gavin are Cellecz" wife and child. Smith was upset because he had given Cellecz some jewelry and stuff to pawn and Cellecz was snitching on him. (ROA 2447-2451) Hull was concerned about an observation camera at the front of the bus that was close to where he was sitting. Hull was hoping the camera did not have audio because someone was asking him to communicate a threat. (ROA 2454) Hull was brought to Manatee County Jail in March. He had known Cellecz for about two months. A week or two before Hull testified, he wrote a letter to the State Attorney saying that the prosecutor was supposed to communicate some interest that Hull had regarding testifying at trial. Hull was trying to use his testimony to benefit himself. (ROA 2454-2459) (ROA 2460) Hull went on to ask for a reduction of his sentence from five years to three years or a transfer to a closer facility. (ROA 2461, 2462)

When Hull returned to the county jail he went to Cellecz and told him what Smith had said. Hull did not go to law enforcement with this information, but they eventually came to him. The area sergeant came to Hull that evening. Three or four days later, Detective Foy came and talked to Hull. Hull did not ask for any special deals when he talked to Foy. (ROA 2452)

James Cellecz is a computer repair technician. Cellecz had been convicted of six felonies and was on probation when he testified. In August of 2009 he was 5'06"

and about 145 pounds. Nancy Peirce found a buyer for a television that Cellecz was trying to sell. The buyer was Delmer Smith. Cellecz met Smith in 2009. Cellecz informed Smith of his background in computers.

Cellecz met Smith's girlfriend Michele Quinones and had been to her house. Quinones was a DJ and Cellecz worked on a computershe used in her business. (ROA 2473-2476, 2479, 2480) Cellecz never rode motorcycles with Smith and had never been to Peggy's Corral in Palmetto. Cellecz did not know Helene Milligan, Bobby White, Wesley Mills, Kimberly Osborne, Joshua Koch, or Eugene McDaniel. Cellecz had met Bryan Illyes but he never called him on the telephone. (ROA 2477, 2478)

In 2009 when Cellecz was spending time with Smith he was renting a place in Venice from David Watmough. Smith bought an enclosed trailer from Watmough. (ROA 2478, 2479) Cellecz recognized exhibit TK-1 as an item he pawned. On August 4, 2009, Smith picked Cellecz up that morning in his Chevy Blazer and they drove around doing some errands. They ended up at Pawn Stars pawn shop and Smith had a couple of jewelry pieces. Smith said he had forgotten his ID and asked Cellecz if he could pawn the jewelry items. They both went into the pawn store and Cellecz pawned the necklace and the other jewelry. Smith chose the pawn shop. Cellecz had never been to that pawn shop before. Smith told Cellecz that the jewelry came from David Watmough. Smith said he purchased it for a hundred dollars. Smith said not to bring

it up because the jewelry was from Dave's fiancée and he didn't want it known that he had taken the jewelry from her. (ROA 2480-282)

Cellecz took the jewelry to the counter and got a price. Cellecz conferred with Smith to see if it was a good deal. Smith gave his approval to accept the offer. (ROA 2482) When Cellecz was riding in the Blazer, he noticed a blue medical encyclopedia on the floorboard of the Blazer. Cellecz recognized exhibit AW-62(A) as the medical encyclopedia. Smith carried around a backpack that contained grey duct tape, gloves, and ski masks. Cellecz saw the backpack more than once. (ROA 2483, 2484)

Cellecz sold items to Smith such as a refrigerator, computer parts, helicopter toys, television sets. Cellecz did not sell a car radio, speakers, and jewelry to Smith. Cellecz never drove Smith's vehicle. Cellecz had a lockbox that he sold to Delmer Smith. Cellecz may have placed one or two phone calls on Smith's phone, but never outside of Smith's presence. Cellecz helped Smith fix a broken car window by duct taping a plastic bag over the opening. Cellecz did not remember where the duct tape came from. (ROA 2484-2486, 2493)

Cellecz had a pending felony violation of probation where his exposure was 20 years in prison on two cases. He was sentenced to 11 months, 29 days in county jail. The bottom of the guidelines on that case was 100 months imprisonment. (ROA 2487, 2488) Cellecz gave interviews to the police, and every one was different. Cellecz had

a substance abuse problem back then. Cellecz had access to Smith's storage and took a bicycle and a GPS out of Smith's property when Smith was incarcerated. Cellecz denied breaking into Briles residence and killing Mrs. Briles. (ROA 2488- 2490) Cellecz participated in a courtroom demonstration where he lifted the sewing machine. (ROA 2493)

Kristen Venema, Kathleen Briles' daughter, was living in Bradenton on August 3, 2009. A few months after her mother was killed, Detective Foy showed Venema some jewelry, and she was able to identify the necklace immediately. Pictures were admitted into evidence showing Venema wearing the necklace for her prom and Briles wearing the necklace at Venema's wedding. (ROA 2496-2498)

Eugene McDaniels met Michele Quinones when he was working at PGT. She introduced Smith to McDaniels and, on occasion, Smith would come and hang out at McDaniels' house. McDaniels did not remember receiving phone calls on August 3, 2009 at 12:57 and 1:16 p.m. McDaniels had never met Cellecz before the day he testified in court. (ROA 2499-2503)

Joshua Koch worked at Publix on Manatee Avenue in 2009. Koch rode a motorcycle and met Smith while on a smoking break at work. They formed a friendship, exchanged phone numbers, and rode motorcycles together a few times. They would occasionally call each other on the phone. Koch did not know Cellecz.

(ROA 2504-2508)

Bryan Illyes, nicknamed Flying Bryan, lived in North Port in August of 2009. Illyes rode motorcycles with Smith and Wesley Mills. They would ride to Peggy's Corral on Sundays. Illyes did not know Cellecz. Illyes never received a call from Smith's cell phone where it was someone other than Smith. Illyes did not recall receiving a call from Smith or making a call to Smith the evening of August 3, 2009. (ROA 2509-2512)

Jack Jones knows Smith, Kim Jacques, and Bobby Witte. Jones had phone contact with Smith in the summer of 2009. (ROA 2514-2517) Wesley Mills identified his phone number on exhibit JD-2. Mills did not recall receiving calls from Smith around 10:43 on August 3, 2009. Mills did not recall receiving a call where caller ID reflected the call was from Smith and the person speaking on the other end was someone other than Smith. (ROA 2517-2521)

Robert Witte's phone number showed on Smith's contacts as Bobby. Witte never had anyone other than Smith answer the phone when Witte called Smith. Witte did not know Cellecz. Witte did not recall any of the phone conversations with Smith at 1243, 1846, and 2012, on August 3, 2009. (ROA 2532-2535)

Kimberly Jacques' phone number appeared in Smith's contacts as K. Jacques. She did not recall any phone conversations she had with Smith on August 3, 2009, at

2100 and 2230 hours. Jacques met Cellecz through Smith. Jacques never had any phone communication with Cellecz. (ROA 2536-2540)

Helene Milligan was working at BP gas station in thesummer of 2009, where she met Smith. They exchanged cell phone numbers. Milligan did not know Cellecz. When Milligan called Smith or received calls from Smith, she never spoke to anyone other than Smith. Milligan did not recall placing calls to Smith's phone number on August 3, 2009. (ROA 2540-2544)

The State rested, and defense moved for a judgment of acquittal because there was insufficient evidence presented to prove that Delmer Smith was the person who murdered Ms. Briles. (ROA 2550) The motion for judgment of acquittal was denied. (ROA 2550, 2551)

PENALTY PHASE

Robert Feverston, latent print examiner, compared the known prints of Delmer Smith with those on State's exhibits M8, M9, and M12, copies of prior violent felony convictions. These exhibits were moved into evidence. (ROA 738-745, 746, 747, 760-764; 2682)

Gerri Cotter was Delmer Smith's supervising probation officer from September 16, 2008, until October of 2009. The indictment and judgment of conviction relating to M8 were admitted into evidence. Cotter was supervising Smith for the offenses of bank robbery, aiding and abetting, and carrying a firearm during a crime of violence.

Mr. Smith was in prison prior to coming onto probation and was still under probation supervision on August 3, 2009. (ROA 2685-2689)

Nicole Mitchell lives in Canada part of the year and Sarasota part of the year. In 2009, Mitchell was renting a house on Carmilfra Drive in Sarasota. On March 14, 2009, around 10 p.m., Mitchell was watching TV. At 10:03 p.m., she went to the kitchento put some things away and heard a noise. She couldn't figure out if the noise was coming from inside or outside the house and went back to watching TV. (ROA 2690-2695)

Mitchell felt a presence, turned around, and the lights went off. She saw a big black shadow and realized it was a big person. Mitchell felt a person grab her, and she started screaming. Mitchell believed the person was wearing a mask because she couldn't see the face. Mitchell was pushed face down on the couch. The person asked Mitchell to stop screaming, and if she didn't stop, he had a gun and would kill her. Mitchell felt something hard like a gun on her temple. He grabbed Mitchell's whole face and tore part of her lip with his gloved hand. Mitchell pulled her wedding ring off and threw it under the couch. (ROA 2695-2698)

The man grabbed Mitchell by the back of the hair and asked her to give him all of her jewelry. He took her into the walk-in closet in the master bedroom to look for valuables. He told Mitchell to kneel on the floor and not look at him. He told Mitchell to cooperate and showed her the gun. He took Mitchell back into the living room and then the kitchen. When he saw the computer, he told her to pack the computer and give him the password. They went into the garage to get tools so he could take the

TV. They went back to the living room, and he asked Mitchell to lie down on the floor. (ROA 2699-2701)

He took the TV set off the wall and told Mitchell he was sorry he had to do this. He grabbed an electrical cord and tied her hands behind her back, tied her feet, and tied the whole thing around her neck so she would strangle herself if she moved her legs. He went through the master bedroom again where he found her wallet and a little money. He took her watch and made a mess of everything. He said he was going to get his partner to bring the car around. Mitchell never saw or heard anyone else. Mitchell heard a door open, and she heard the car leave. He told Mitchell she should stay put because his partner was watching. Mitchell lied still for a long time and then was able to get her right hand out of the cord and then untie her legs. Mitchell ran to her neighbor's house to get help. Mitchell testified at the trial of Delmer Smith. He was convicted and received a life sentence. (ROA 2702-2704) The jury heard victim impact statements from the victim's family members. (ROA 2707, 2709)

Defense called Alicia Phillips, who is Smith's niece. Phillips is close to Smith and loves him very much. Phillips lived with Smith and her grandparents from the time she was born until she was 10 or 11. Smith came to Phillips aid when Phillips was getting spanked and her nose started bleeding. Smith would always come to her aid. A picture of Phillips and her uncle that she keeps on Facebook was admitted into evidence. Smith was her favorite uncle. He would give her presents and take her out. Smith tried to guide her in the right direction. He made her promise that she would

finish school and refrain from having babies at a young age. (ROA 2721-2725)

Phillips continued to communicate with Smith while he was in prison for about 15 years. Phillips would write letters and visit Smith with her grandmother. After her grandmother, Smith's mother, passed away, it was more letters and phone calls. Smith was in prison when his mother and father died. Phillips attributes the fact she can take care of herself and her daughter to the guidance provided her by Delmer Smith. Smith is someone who has guided her in life to do the right thing, and she still loves him. (ROA 2725- 2728)

Christina Smith is Delmer Smith's niece. Christina Smith lived with her grandmother, Delmer Smith's mother, when growing up. Christina Smith was too young to know that Delmer Smith went to prison for a long time. She just knew he was away. Christina Smith learned about Delmer Smith being in prison when she was older, and she started writing to him. Christina wrote to Smith a lot through her teen years. Christina would speak to Smith on a regular basis on the telephone, and he would always ask how they were doing and wanted them to stay out of trouble. Smith provided guidance to Christina during the phone calls. Christina loves Delmer Smith and credits him a lot with her being able to take care of herself. (ROA 2729-2734)

Dr. Hyman Eisenstein, a licensed psychologist, evaluated Delmer Smith on two occasions in July of 2012. Eisenstein conducted a neuropsychological evaluation to determine if Smith had any deficits or impairments of brain functioning. (ROA 2735-2738) Eisenstein administered standardized tests and scored them to arrive at his

conclusions in this case. Eisenstein also reviewed reports, previous testing, obtained background information, and school records to get a better picture of Smith's life in its entirety. (ROA 2738-2743) Mr. Smith repeated the 2nd grade, 3rd grade, 4th grade, and 5th grade. This is virtually unheard of repeating grade after grade. By the time he was 14, he was in 5th grade. Finally, in the 5th grade, he was promoted to the 9th grade to go into special education in the Detroit system. (ROA 2744)

IQ testing at that time revealed a verbal IQ of 70 which is borderline, meaning if he obtained a 69 he would be in the mentally retarded range. He had a performance IQ of 86 and full scale IQ of 75 which is borderline. His overall intellectual abilities were extremely low. Smith had attention deficit disorder which was virtually unknown back in 1986, and he was not treated. His lack of impulse control was never treated and was an issue that plagued Smith his entire life. (ROA 2745)

Eisenstein reviewed a three-page summary report of psychologist John Deluca, which indicated Smith had problems of poor impulse control and was emotionally impaired. There were reports that Smith suffered from physical, emotional, and sexual abuse. Smith was bi-racial with a white mother and a black father. Smith was called derogatory names referencing his racial status which were demeaning and abusive. (ROA 2745, 2746)

Eisenstein concluded that Smith has several major issues that have plagued him his entire life. He has Attention Deficit Disorder Hyperactivity and academic failure. He was really out of school by the time he was 14. He wasn't treated for any learning disabilities until he was 14. Five or six years had passedbefore the issues were starting

to be addressed. Smith had borderline intelligence almost in the mild mental retardation range. To his credit, Smith did a lot of self-improvement while he was in federal prison. He took many classes and tried to better himself. In the testing Eisenstein did, Smith's full scale IQ score had increased from 75 to 89, verbal from 79 to 80, and performance from 86 to 96. Eisenstein attributes the improvement to the 14 years Smith spent in federal prison trying to obtain better skills. (ROA 2747-2749)

Eisenstein opined that Smith has unequivocal brain damage. The objective neuropsychological testing indicates that Smith has brain impairment. Although Smith was able to improve his IQ, his basic brain functioning for judgment, reasoning, problem solving ability, executive functioning, and higher critical processing of information were three and four standard deviations from the norm which put him in the bottom 2 percent of the population. Smith's decision making ability and his ability to process information is profoundly impaired and indicative of cognitive neuropsychological brain impairment. (ROA 2749, 2750)

Eisenstein could only hypothesize about the origins of this brain damage. It is possible there was some impairment in utero. From birth and early age on, there was some significant impairment. Prior to this offense, Smith was in a motorcycle accident where he suffered a contusion and head trauma. Smith was not admitted overnight in the hospital, and there was a negative CT scan of the brain. There are many sources of head trauma and it is cumulative. Looking at a time line, there were problems all along. Smith demonstrated frontal lobe problems. Frontal lobe is the part of the brain that controls inhibition. Although Smith technically meets the definition of anti-social

personality disorder, that is not Eisenstein's diagnosis. Eisenstein thinks it is better explained by his brain pathology that is so clearly demonstrated from the neuropsychological tests. There is another diagnosis called intermittent explosive disorder, which is in the Diagnostic and Statistical Manual. (ROA 2750-2754, 2780)

Smith's behavior in prison was excellent. He had no episodes of major violent disorder and over a long period of time his behavior was in control. This does not change Eisenstein's diagnosis of brain impairment because in a controlled environment one doesn't have to exercise the amount of self-control as in the free world. In a prison environment the controls put on the individual help negate the possibility of engaging in that type of irresponsible out-of-control behavior. Eisenstein thought Smith did plan the robbery, but not very sophisticated planning, and that was separate from the impulsivity which led to the violence. Eisenstein hypothesized that when confronted with the situation, Smith's reaction was sort of shock. Smith got himself involved further because of his inability to step away from a bad situation. That is where the frontal lobe plays a part in terms of the violent act. There was no pre-planning; it was just reactive to a bad situation that went even worse. (ROA 2754-2756)

There are varying degrees of brain damage. There are injuries that are not obvious. People are walking and talking and seem to be okay, but they are far from okay. Because Smith suffered from brain impairment and intermittent explosive disorder, Eisenstein recommended further testing, including MRI, PET scan, and EEG. Eisenstein believed these tests would demonstrate abnormalities consistent with the

neuropsych data and explain Mr. Smith's behavior from a brain pathology model. (ROA 2756-2758)

Smith tends to downplay his impairments and wants to appear normal. Even though he was able to work hard and obtain skills he continued to demonstrate profound brain impairment. (ROA 2759-2761) Smith has intermittent explosive disorder and Attention Deficit Disorder. Eisenstein was of the opinion that Smith committed the crime while under the influence of extreme mental or emotional disturbance and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (ROA 2784, 2785)

The State called Dr. Wade Myers on rebuttal. He is a medical doctor and professor in the psychiatry department at Brown University. (ROA 2791) Psychiatry is a subspecialty of medicine that deals with the diagnosis, assessment, and treatment of mental disorders. Myers is not a psychologist and does not have training in that field. (ROA 2795)

Myers reviewed training school records of Smith, prison records, medical records healthcare records, and trial, and trial transcripts in reaching an opinion on Smith's mental functioning. Myers also reviewed Eisenstein's report and the raw data from his testing. (ROA 2796) Myers diagnosed Smith as having antisocial personality disorder. Smith met just about every criteria for antisocial personality disorder. His prison disciplinary records did not support Smith being an impulsive person, but a person who is well in control of his impulses. Myers saw no record of Smith being in

fights while in prison. There was an indication that Smith was treated for a sprained ankle and knee pain from participating in sports. Smith had not been treated or diagnosed for mental disorders while in prison. (ROA 2800-2803) None of the prison records revealed brain impairment or a diagnosis of intermittent explosive disorder. (ROA 2804)

When Myers met with Smith two days before Myers testified, Smith appeared to be very angry, frustrated, and hostile, but he did cooperate with the evaluation. When questioned about family history, Smith asked to keep his family out of it and Myers honored that request. After Smith took the first part of a test that showed he was oriented, Myers stopped his testing because it appeared that Smith was not in the mood to take any tests from Myers. Myers spoke with Smith for about an hour and 15 minutes. (ROA 2806, 2807) Smith's language and ability to comprehend was normal. Smith said there was nothing wrong with his brain and that his brain was fine. After his motorcycle crash in July of 2009, Smith was oriented in the emergency room and his mental status was normal. Myers did not see him having any repercussion from the accident. Mild brain injuries completely resolve within days to weeks, rarely months in 90% of the cases. (ROA 2808, 2809)

Smith showed restraint and self-control in the robbery and kidnapping of Nicole Mitchell by deciding to leave her bound and do no further harm. Smith was problem solving and flexible in his thinking. He demonstrated good impulse control by talking

to her and not hitting her to make her be quiet. Smith was clearly exercising free will when he killed Kathleen Briles. Smith made the decision to go get something with which to kill her, decided to bludgeon her with a heavy sewing machine, and repeatedly bludgeoned her to death. (ROA 2811, 2812)

Myers found no evidence of brain damage because Smith could function adequately without problems in life. Myers concluded that Smith has an average functioning brain with extra talents in the area of mechanical thinking and electronics. (ROA 2812)

FACTS INRODUCED AT 3.851 EVIDENTIARY HEARNG

At the evidentiary hearing the following evidence was introduced:

Dr. Eisenstein stated that he was asked prior to trial to conduct a neuropsychological evaluation of Mr. Smith by his attorneys. (PC-ROA 942) He was retained in June of 2012 and was given some background material and completed a two-day evaluation of Mr. Smith. (PC-ROA at 944). He began his background investigation in July of 2012, when Mr. Smith's trial was scheduled for the next month. He characterized that as not a normal amount of time to be asked to conduct a full-blown evaluation and investigation of Mr. Smith. (PC-ROA 945) He recalled no conversation from Mr. Smith's counsel about getting a continuance to conduct a more complete penalty phase investigation. (PC-ROA 946). Dr. Eisenstein outlined the materials he was provided concerning Mr. Smith. (PC-ROA 946).

As a result of the testing he conducted and the review of the background materials, Dr. Eisenstein at the time of trial formulated an opinion that Mr. Smith has profound unequivocal brain damage, frontal lobe executive functioning impairment, illogical and inflexible thinking, suffers from intermittent explosive disorder, developmental learning disorders, attention deficit disorder greatly impairing his memory. (PC-ROA 957)

Concerning family history Dr. Eisenstein stated he was provided information that Ms. Velma Shelton had moved out of the Household with Delmer Smith Sr. because he was too critical of Delmer and was abusive to him and the other children. He further stated that he was not provided an opportunity to talk to Mr. Smith's siblings to get directly from them what sort of abuse was occurring within the household. (PC-ROA 960). He stated that would be something he would like to do before giving testimony concerning mitigating circumstances. (PC-ROA 961). He stated that the lack of an opportunity to expand upon and find out details as to the extent of the abuse in the household was a handicapping factor as far as his ability to put forth the full picture of mitigating circumstances on behalf of Mr. Smith. (PC-ROA 961). Additionally, Dr. Eisenstein was not given any opportunity to speak to Mr. Smith's siblings between the August 2012 sentencing proceeding before the jury and the April of 2013 Spencer hearing, a span of approximately 8 months. (PC-ROA

962). Dr. Eisenstein was not asked to go to Detroit to interview any of Mr. Smith's siblings. (PC-ROA 962). He stated it is common in cases of abuse within a household that witnesses to it are reluctant to come forward with testimony, due to the psychological effect of such sensitive information.

Dr. Eisenstein then testified as to being contacted by postconviction counsel and going to Detroit with the undersigned counsel, investigator Sophia Sustaita to interview Mr. Smith's siblings, including Patricia Smith, Janet Shelton, and Dale Shelton. (PC-ROA 967). Dr. Eisenstein later reviewed the video-taped deposition of Patricia Smith, taken by counsel in Detroit, and introduced into evidence at the evidentiary hearing. (Defense Exhibit #3). He felt there was important information obtained during that deposition which corroborated his direct discussions with Patricia Smith as follows:

> Delmer Smith Sr. was very strict, and used extension cords, sticks, metal rods, pots, pans and belts on the children. They all got hit, but Delmer got it the worst. Patricia stated that her father would "tear Delmer up" reminding her of slavery, leaving welts and red marks on his back. If Delmer was involved in a fight and lost his dad would beat him up. He called Delmer a half breed, the n-word, and a bitch. These beatings of Delmer would occur several times a week. Delmer was often restrained during these beatings, and sometimes would occur while he was naked and in the bathtub. Patricia was also the subject of repeated beatings from her father and still had a scar on her leg as a result. The beatings occurred until Delmer was 12 or 13 years old. (PC-ROA 967-972).

Dr. Eisenstein also relayed his conversations with Janet Shelton, one of Delmer's siblings:

> Janet Shelton lived in the household and is six years older than Delmer. When Delmer was born the members of the household were Velma Smith, Delmer Smith Sr., Janet Shelton, Dale Shelton, and Delmer Smith. Janet stated there was a lot of domestic abuse between Delmer's mother and father, and she witnessed the father striking Delmer's mother in the stomach while she was pregnant with Delmer. When Delmer was five years old the "whoopings" of Delmer started and continued until he was 12 or 13 years old. The physical abuse occurred every weekend. The father would use cords, switches and belts often when Delmer was naked in the bathtub. They would cause bleeding and welts so many you couldn't even count. She reported that when Delmer was about nine and getting bigger he would get tied up to a pole in the basement and beaten by his father. He would call Delmer a half-breed, the n-word, bitch, a piece of dirt, told he would never be anything, and was nothing, and to get out and don't come back. (PC-ROA 978-979).

Dr. Eisenstein testified that the information of the severe physical abuse obtained from Patricia Smith and Janet Shelton added a very significant dimension in terms of understanding not only diagnostically but also in terms of mitigating circumstances in terms of the effect the horrific abuse had on Delmer Smith. The abuse provided Dr. Eisenstein information for an additional diagnosis of Post-Traumatic Stress Disorder. He also stated that the additional diagnosis and evidence of severe abuse strengthened his opinion that both statutory mental mitigators were present in Mr. Smith's case. (PC-ROA 979-985)

Bjorn Brunvand, counsel for Mr. Smith at trial and sentencing, was also presented at the evidentiary hearing. He stated he primarily worked on the penalty phase. (PC-ROA 1010). He stated there was a time where Mr. Smith was only interested in the guilt phase, and did not want any penalty phase investigation. (PC-ROA 1012). However, he did sign several forms to allow counsel to obtain background records before Dr. Eisenstein was retained. (PC-ROA 1012). The data was acquired by investigator Colleen Quinn-Adams. (PC-ROA 1012). Up until shortly before trial Mr. Smith did not want his family members spoken to. (PC-ROA 1014). At some point counsel decided to talk to the family members anyway. (PC-ROA 1015). He admitted to having a report from Dr. Eisenstein which made some reference to Delmer's father being abusive to him but providing no details. (PC-ROA 1018). The date of the report was August 8, 2012. (PC-ROA 1019). The only sibling the defense spoke to was Alice Smith and did not interview Janet Shelton or Patricia Smith. (PC-ROA 1019) They had not called back from telephone calls. (PC-ROA 1020). He never contemplated asking for a continuance of the penalty phase in order to locate and speak to Mr. Smith's other siblings. (PC-ROA 1020). He admitted that talking to people in person is superior to over the telephone. (PC-ROA 1021). He said had he gotten information of abuse from any of the siblings he would have used it during the penalty phase. (PC-ROA 1021). He admitted that the

sentencing order discounted the abuse of Delmer because it was based upon only a "passing reference" to it in one report. (PC-ROA 1021). He further stated that he was not aware of any efforts between the penalty phase before the jury and the Spencer hearing to contact Mr. Smith's siblings about the abuse suffered by Delmer within the household. (PC-ROA 1021).

During the evidentiary hearing the parties entered into a written stipulation concerning Jessica Jarecki. (PC-ROA 418-419). It stated as follows:

> 1. On September 16th, 2009, Ms. Jessica Jarecki went to 3712 Bobko Circle in her capacity as a Crime Scene Technician with Sarasota County Sheriff's Office.
>
> 2. While Ms. Jarecki was at that address that day, items were removed from the attic of the residence that belonged to Delmer Smith, which he had asked Martha Tajeda to store at her residence.
>
> 3. Items in the attic were removed by Crime Scene Technician Jessica Hendrickson.
>
> 4. Included in the items removed from the attic on September 16th, 2009, was a red duffle bag. A photograph of this bag was taken by the officers at the scene as they first saw it, which was state's trial exhibit P-2 and P-3.
>
> 5. After the duffle bag was removed from the attic, it was opened by law

enforcement officers. State's trial exhibit P-4 and P-9 depict the open bag as it appeared at the scene on September 16, 2009.

6. On September 18, 2017, 2009, at the crime scene lab Ms. Jarecki also photographed a medical textbook which had been removed from a garbage bag within the duffle bag, the one previously depicted in trial exhibit P-2 and P-3, and state's trial exhibit p-12. That's the picture of the bag in its open state.

7. To the best of Ms. Jarecki's knowledge at no time did law enforcement officers ever obtain or attempt to obtain a warrant to search the duffle bag located in the attic on September 16th, 2009, the one depicted in State's trial exhibit P-2 and P-3, prior to opening the bag and the removal of the medical textbook and silver personal safe from the bag – the silver safe depicted in state's exhibit P-10.

8. The police did not a get a warrant to search the red duffle bag.

At the evidentiary hearing, Trial Counsel Hernandez stated he did not file a motion to suppress because "the items that were at issue were stolen items from the victim and her family, and my understanding of the law is that a search warrant was not needed for either the items in the duffle bag, including the safe" (PC-ROA 1115). He said he "never seriously considered filing a motion to suppress." (PC-ROA 1116) Counsel further admitted he did not take the depositions of the crime scene technicians who opened the duffle bag. (PC-ROA 1118). Counsel admitted that

during the trial the **State** had raised the issue of a possible 3.851 motion because counsel had not deposed any crime scene technicians or anyone who collected physical evidence belonging to the victim, Kathleen Briles.

At the evidentiary hearing trial counsel stated that he had received a report from the state that a Detective had conducted a forensic examination of Mr. Smith's cell phone and extracted the mobile phone number, list of contacts, and photographs. (PC-ROA 1100). Also, he admitted that there was no search warrant obtained by the Detective prior to conducting the forensic search of Mr. Smith's cell phone. (PC-ROA 1101). Counsel stated he did not file a motion to suppress the evidence obtained via the warrantless search because "at the time there was no basis for such a motion." (PC-ROA 1101). Counsel was shown the *Smallwood v State* case from the First district which had presented a certified question of great public importance to the Florida Supreme Court of "Does the holding in the *United States v. Robinson* case allow police officers to search photographs contained within a cellphone which is on an arrestee's person at the time of a valid arrest."(PC-ROA 1103). The docket entry from the Florida Supreme Court indicated it had taken jurisdiction to answer that question well before Mr. Smith's trial. (PC-ROA 1104, Defense Exhibit 12). Counsel stated that, had he known of the Florida Supreme Court accepting that question, he would have asked for a continuance but not filed a motion to suppress

because of the law existing at that time. (PC-ROA 1104). Also, had he become aware of the Florida Supreme Court's ruling in *Smallwood* on May 2nd, 2013, which was prior to Mr. Smith's sentencing, he would have filed some sort of motion with the court, but he was not aware of it. (PC-ROA 1106). Counsel further stated he was aware that the police located some of the people on the contact list which had been revealed during the warrantless search, and called them to testify in Mr. Smith's trial. (PC-ROA 1107).

After outlining his qualifications and experience in forensic cell phone and tower expert testimony (PC-ROA 1064), Mr. Robert Aguero addressed the deficiencies of Detective Diamond's trial testimony. He reviewed the call detail records from MetroPCS and the cell tower information. (PC-ROA 1065) (Defense Ex. 4 -5). He also reviewed a map prepared by Detective Diamond (Defense Exhibit 7). He also prepared a map of his own (Defense Exhibit 6). Based on his review, Mr. Aguero stated that Detective Diamond's conclusions concerning tower 304 (the one near the Briles residence) was faulty in that the south facing sector was made very narrow, and the other two sectors were made very wide. (PC-ROA 1069-1070). He also stated that the only way to get the precise coverage area would be to obtain a radio frequency propagation map for each of the sectors or conducted a drive test of the area. (PC-ROA 1071-1072). As to the call from that tower on August 3, 2009 at

3:44 P.M. which lasted 8 seconds the only thing that can be accurately stated is that the phone making that call was within 30 miles of that tower. (PC-ROA 1073). Since the tower is facing toward the bridge it would be reasonable to expect that it covered that bride going across the bay. (PC-ROA 1074). Mr. Aguero specifically stated that Detective Diamond's trial testimony that "the furthest tower connection you're going to get is maybe 7 to 8 miles" was not accurate. (PC-ROA 1075). The actual maximum range is 30 miles. (PC-ROA 1074-1075) Therefore, the 3:44 call could have been made between a short distance (a few blocks) and 30 miles from the tower, encompassing the area over the bay and Skyway Bridge. (PC-ROA 1076). Additionally, Mr. Aguero took issue with width of the sectors used by Detective Diamond, causing a very narrow range of coverage for the sector that the call at 3:44 P.M. utilized. (PC-ROA 1077).

At the evidentiary hearing defense counsel could provide no valid strategic reason for not hiring a cell phone/tower expert. He simply stated he "did not think it would be helpful" because "there was other evidence that put him in the general vicinity anyway." (PC-ROA 1109). However, the only testimony he could recite was other unchallenged cell phone activity which "showed Mr. Smith was traveling from North Port all the way up to Manatee County at the time the victim was at the grocery store." (PC-ROA 1110)

SUMMARY OF THE ARGUMENT

CLAIM I:

The Lower Court erred in denying Appellant's claim that counsel was ineffective in the penalty phase for failing to conduct a complete investigation of available mitigating circumstances for presentation at the penalty phase. Counsel specifically failed to conduct and obtain critical mitigating evidence from family members of severe and pervasive physical abuse suffered by Appellant during his childhood, which led to an incomplete mitigation presentation during the penalty phase.

CLAIM II

The lower Court erred in denying Appellant's Claim that his trial counsel was ineffective for failing to file a Motion to Suppress evidence the police found as a result of an illegal search and seizure of items in a duffle bag that belonged to Mr. Smith. The crime scene technician violated Mr. Smith's rights under the fourth amendment by conducting a warrantless search of a duffle bag that the police had actual knowledge belonged to Mr. Smith. Had a timely motion been filed then the state would not have been able to use at trial the medical textbook, coins, a Minnie mouse key ring, a gold colored lock, and a men's Geneva watch.

CLAIM III

The lower court erred in denying Appellant's claim that counsel was ineffective for failing to file a motion to suppress information seized by law enforcement via a warrantless search of his cell phone. At the time of Mr. Smith's trial this Court had accepted the issue of a warrantless search of a cell phone in the *Smallwood* case as a matter of great public importance. Counsel should have been aware of that fact and filed a motion to suppress to preserve the issue for the appellant. His failure to do so constituted ineffective assistance of counsel

CLAIM IV

The lower Court erred in failing to retroactively apply the opinion in *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed. 2d 430 (US 2014) and granting him a new trial as the Court ruled the police cannot search a cell phone without a warrant as happened in this case.

CLAIM V

The lower court erred in denying Appellant's claim that his counsel was ineffective for failing to hire an expert witness in the area of the tracking of cell phones and cell phone towers to counter the state's expert at trial who provided inaccurate and forensically unsound opinions to the jury as to the tracking of Mr. Smith's cell phone on the day of the homicide. Counsel for Appellant who made this

error could produce no valid justification for his inaction at the evidentiary hearing.

CLAIM VI

This Court should grant the appellant *Hurst* relief even though there was a unanimous recommendation for death, as critical information was presented only to the judge at a *Spencer* hearing as to objective evidence of Appellant's brain damage.

CLAIM I

THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT COUNSEL WAS INEFFECTIVE IN THE PENALTY PHASE FOR FAILING TO CONDUCT A COMPLETE INVESTIGATION OF AVAILABLE MITIGATING CIRCUMSTANCES FOR PRESENTATION AT THE PENALTY PHASE OF THE TRIAL

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review.

This Court summarized the evidence presented by the Appellant in the Penalty phase as follows:

> Smith presented testimony from two of his nieces, who are close to Smith and testified how Smith provided guidance and helped them. Smith also presented testimony from a psychologist, Dr. Hyman Eisenstein. Dr. Eisenstein reviewed Smith's background and various records and testified about Smith's dismal progress in school, including the fact that he repeated grades so often in elementary school that he was fourteen years old when he was in

the fifth grade and was then promoted to the ninth grade for special education. A report indicated that, during his childhood, Smith had been physically and emotionally abused by both of his parents and suffered sexual abuse by his father.

Dr. Eisenstein noted that Smith was in a motorcycle crash that caused some head trauma. Dr. Eisenstein opined that Smith has attention deficient disorder (hyperactivity), academic failure, and unequivocal brain damage. While Dr. Eisenstein recognized that Smith could have met the definition of antisocial personality disorder, he believed Smith had intermittent explosive disorder instead. Further, Dr. Eisenstein testified that Smith's decision-making ability was profoundly impaired and his judgment, reasoning, executive functioning, and higher critical processing of information were three to four standard deviations below the norm. Dr. Eisenstein stressed that Smith had excellent behavior in prison—a controlled environment where self-control is not as necessary. Dr. Eisenstein concluded that Smith committed the murder while under the influence of an extreme mental or emotional disturbance and that Smith's ability to appreciate the criminality of his conduct or conform to the requirements of law was impaired.

In rebuttal, the State called Dr. Wade Myers, a medical doctor and professor in the psychiatry department at Brown University. Dr. Myers reviewed Smith's records and Dr. Eisenstein's report, including the raw data underlying that report. Dr. Myers disagreed that Smith had impulse problems, noting that Smith did not have any records of being in fights while he was in prison and that Smith exercised self-control during the prior Sarasota home invasion. However, Dr. Myers diagnosed Smith with antisocial personality disorder.

The jury unanimously recommended that Smith be sentenced to death. The trial court conducted a *Spencer* hearing, during which Smith presented the testimony of Dr. Ruben Gur, a psychologist who specialized in neuroimaging. Dr. Gur reviewed Smith's MRI and asserted that Smith's brain had tissue loss and opined that Smith had brain damage on the right side and in the orbital

frontal area of his brain. In reviewing Smith's PET scan, Dr. Gur testified that some areas showed hyper-metabolism, which can cause brain damage because toxic chemicals are released, while other portions of Smith's brain showed decreased metabolism. These abnormalities would cause deficits in the ability to experience normal emotions and affect his self-control. Dr. Gur concluded that based on these issues, Smith's "thinking brain" was hyperactive at the resting state and that if Smith felt threatened, his "thinking brain [would] become deactivated."

Smith also recalled Dr. Eisenstein, who reaffirmed his conclusion that Smith has brain damage. He also stated that Smith had a "very primitive amygdala melt-down response," which hindered his ability to modulate emotional responses and respond appropriately in high stress situations, including the ability to walk away from difficult situations.

The State then called Dr. Helen Mayberg, a board certified neurologist with a strong background in neuroimaging. Dr. Mayberg disagreed that a PET scan could be used as a "general screening test," testifying that a PET scan can be influenced by the level of anxiety present at the time of testing and noting that Smith had complained of anxiety shortly before the testing. Dr. Mayberg further emphasized that she was unaware of any medical professional who used Dr. Gur's method of analysis to reach a medical diagnosis. According to Dr. Mayberg, Smith's PET scan was "very normal looking" and showed no areas of brain damage. She further disagreed that Smith had a demonstrated impulse control problem, testifying that brain damage to the frontal lobe affects all aspects of a person's life, as opposed to the very narrow circumstances present in Smith's record.

After considering the evidence presented during the penalty phase and the *Spencer* hearing, the trial court found that the aggravating circumstances "overwhelme[d]" the mitigating factors. The trial court found that five aggravating circumstances applied and assigned each the following weight: (1) Smith was on felony probation (moderate weight even though the murder

> occurred less than a year from the date of Smith's release from prison); (2) Smith had prior violent felony convictions (great weight as to the 1991 state robbery conviction and the 1995 federal armed bank robbery convictions and noting that the court would also assign great weight to the Sarasota home invasion armed robbery conviction if that conviction was upheld on appeal[2]); (3) the murder was committed in the course of a burglary (moderate weight); (4) the murder was committed for pecuniary gain (no weight because it merged with the committed-in-the-course-of-a-burglary aggravator); and (5) the murder was especially heinous, atrocious, or cruel (HAC) (great weight).
>
> The trial court, however, rejected both of Smith's proposed statutory mitigators: (1) Smith committed the murder while under the influence of an extreme mental or emotional disturbance; and (2) Smith's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In making this finding, the trial court recognized that the State's expert witness testimony "conflicted radically" with the defendant's expert witness testimony and found the State witnesses to be "more persuasive and convincing." The trial court did find that five nonstatutory mitigating factors applied and assigned each the following weight: (1) intermittent explosive disorder (moderate weight); (2) loving relationship with nieces (little weight); (3) physical, emotional, and sexual abuse as a child (little weight); (4) acute academic failure and attention deficit disorder (significant weight); and (5) good conduct while in custody (moderate weight).

Smith at 750-752

The defense failed to conduct a complete mitigation investigation in Mr. Smith's case. Specifically, the undersigned provided to Dr. Eisenstein important

additional mitigating evidence, acquired during the post-conviction investigation - and which could have been discovered at the time of trial - which significantly enhanced the opinions of Dr. Eisenstein concerning mitigating circumstances available in Mr. Smith's case. At the evidentiary hearing Dr. Eisenstein testified as follows:

Dr. Eisenstein then testified as to being contacted by postconviction counsel and going to Detroit with the undersigned counsel, investigator Sophia Sustaita to interview Mr. Smith's siblings, including Patricia Smith, Janet Shelton, and Dale Shelton. (PC-ROA 967). Dr. Eisenstein later reviewed the video-taped deposition of Patricia Smith, taken by counsel in Detroit, and introduced into evidence at the evidentiary hearing. (Defense Exhibit #3). He felt there was important information obtained during that deposition which corroborated his direct discussions with Patricia Smith as follows:

> Delmer Smith, Sr. was very strict, and used extension cords, sticks, metal rods, pots, pans and belts on the children. They all got hit, but Delmer got it the worst. Patricia stated that her father would "tear Delmer up" reminding her of slavery, leaving welts and red marks on his back. If Delmer was involved in a fight and lost, his dad would beat him up. He called Delmer a half-breed, the n-word, and a bitch. These beatings of Delmer would occur several times a week. Delmer was often restrained during these beatings, and sometimes would occur while he was naked and in the bathtub. Patricia was also the subject of repeated beatings

> from her father and still had a scar on her leg as a result. The beatings occurred until Delmer was 12 or 13 years old. (PC-ROA 967-972).

Dr. Eisenstein also relayed his conversations with Janet Shelton, one of Delmer's siblings:

> Janet Shelton lived in the household and is six years older than Delmer. When Delmer was born the members of the household were Velma Smith, Delmer Smith Sr., Janet Shelton, Dale Shelton, and Delmer Smith. Janet stated there was a lot of domestic abuse between Delmer's mother and father, and she witnessed the father striking Delmer's mother in the stomach while she was pregnant with Delmer. When Delmer was five years old the "whoopings" of Delmer started and continued until he was 12 or 13 years old. The physical abuse occurred every weekend. The father would use cords, switches and belts often when Delmer was naked in the bathtub. They would cause bleeding and welts so many you couldn't even count. She reported that when Delmer was about nine and getting bigger he would get tied up to a pole in the basement and beaten by his father. He would call Delmer a half-breed, the n-word, bitch, a piece of dirt, told he would never be anything, and was nothing, and to get out and don't come back. (PC-ROA 978-979).

Dr. Eisenstein testified that the information of the severe physical abuse obtained from Patricia Smith and Janet Shelton added a very significant dimension in terms of understanding not only diagnostically but also in terms of mitigating circumstances in terms of the effect the horrific abuse had on Delmer Smith. The abuse provided Dr. Eisenstein information for an additional diagnosis of Post-Traumatic Stress Disorder. He also stated that the additional diagnosis and evidence

of severe abuse strengthened his opinion that both statutory mental mitigators were present in Mr. Smith's case. (PC-ROA 979-985)

The above evidentiary hearing testimony provided by Dr. Eisenstein contains a plethora of additional mitigating circumstances which should have been presented by counsel at the penalty phase of the case. Most importantly, significant physical abuse of Mr. Smith throughout his childhood was reported by a variety of the family members, providing Dr. Eisenstein with additional diagnostic impressions of post-traumatic stress disorder. At the evidentiary hearing counsel also presented the testimony of both Janet Shelton and Patricia Smith, who both reiterated what they told Dr. Eisenstein about their observations of the severe and repeated abuse suffered by Delmer Smith at the hands of his father during his childhood. (Defense Exhibit #3 with DVD testimony of Janet Shelton).

Bjorn Brunvand, counsel for Mr. Smith at trial and sentencing, was also presented at the evidentiary hearing. He stated he primarily worked on the penalty phase. (PC-ROA 1010). He stated there was a time where Mr. Smith was only interested in the guilt phase, and did not want any penalty phase investigation. (PC-ROA 1012). However, he did sign several forms to allow counsel to obtain background records before Dr. Eisenstein was retained. (PC-ROA 1012). The data was acquired by investigator Colleen Quinn-Adams. (PC-ROA 1012). Up until

shortly before trial Mr. Smith did not want his family members spoken to. (PC-ROA 1014). At some point counsel decided to talk to the family members anyway. (PC-ROA 1015). He admitted to having a report from Dr. Eisenstein which made some reference to Delmer's father being abusive to him but providing no details. (PC-ROA 1018). The date of the report was August 8, 2012. (PC-ROA 1019). The only sibling the defense spoke to was Alice Smith and did not interview Janet Shelton or Patricia Smith. (PC-ROA 1019) They had not called back from telephone calls. (PC-ROA 1020). He never contemplated asking for a continuance of the penalty phase in order to locate and speak to Mr. Smith's other siblings. (PC-ROA 1020). He admitted that talking to people in person is superior to over the telephone. (PC-ROA 1021). He said had he gotten information of abuse from any of the siblings he would have used it during the penalty phase. (PC-ROA 1021). He admitted that the sentencing order discounted the abuse of Delmer because it was based upon only a "passing reference" to it in one report. (PC-ROA 1021). He further stated that he was not aware of any efforts between the penalty phase before the jury and the Spencer hearing to contact Mr. Smith's siblings about the abuse suffered by Delmer within the household. (PC-ROA 1021).

The record from the evidentiary hearing is clear that counsel did not conduct a proper investigation into mitigating circumstances concerning Mr. Smith. Merely

making phone calls to siblings out in Detroit does not in any way constitute an adequate investigation, especially after there was some reference to abuse within the household. It was the responsibility of counsel to reach out to Mr. Smith's siblings in a personal way, as was done in the postconviction investigation. Dr. Eisenstein, when given the opportunity to speak to Mr. Smith's siblings personally in Detroit, uncovered tremendously valuable mitigation circumstances concerning profound and severe physical abuse he suffered throughout his childhood. Most tellingly, counsel admitted he did not do anything in the period between sentencing before the jury and the spencer hearing – a period of eight months – to try and locate and interview Mr. Smith's siblings. This lack of proper mitigation investigation left the court in the position of only passing reference to some sort of abuse suffered by Mr. Smith during his childhood – a far cry from the detailed horror show articulated by Janet Shelton and Patricia Smith concerning the repeated severe abuse administered to Delmer during his childhood.

In *Strickland v. Washington*, 466 U.S. 668 (1984) the Court held that counsel has a "duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* requires a defendant to pled and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Smith pleads both. Had counsel conducted a complete mitigation investigation as required

by *Strickland*, there is a reasonable probability that the outcome of the penalty phase would have been different, sufficient to undermine confidence in the death sentence given to Mr. Smith. Additionally, given the current state of the law in Florida, a death sentence requires a unanimous verdict, by a jury, after proper instruction. Therefore, the burden of proof to establish this claim has lessened as it would only have required the vote of a single jury to recommend life to mandate a life sentence as a matter of law.

CLAIM II

THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM THAT MR. SMITH'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPRESS EVIDENCE THE POLICE FOUND AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE OF ITEMS IN A DUFFLE BAG THAT BELONGED TO MR. SMITH. HAD COUNSEL TIMELY FILED A PROPER MOTION TO SUPRESS THE STATE WOULD NOT HAVE BEEN ABLE TO USE AT TRIAL THE MEDICAL TEXTBOOK, COINS, A MINNIE MOUSE KEY RING, A GOLD COLORED LOCK, AND A MEN'S GENEVA WATCH

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review.

During the investigation of Mr. Smith's case law enforcement officers recorded telephone calls from the county jail between Mr. Smith and his former

girlfriend Martha Tajeda. In those calls, Mr. Smith requested that Ms. Tajeda retrieve some items from a storage facility where he had rented a storage unit. Ms. Tajeda complied with Mr. Smith's request and retrieved two large bags from the storage facility, and put them in her attic to store for Mr. Smith.

After hearing the recorded conversations, law enforcement officers went to Ms. Tajeda's residence and crime scene technicians removed a duffel bag from her attic. Ms. Tajeda told the officers that the bag belonged to Mr. Smith and she had gotten it from his storage facility. Law enforcement officers took a series of photographs of the duffel bag. State's Trial Exhibit P-2 shows the bag in the attic as the officer's first saw it. State's Trial Exhibit P-6 shows the bag after the officers removed it from the attic. States Exhibit P-9 shows the bag after officers had opened it at the scene. The overhead shot of the open bag shows it contained a silver briefcase, a black colored personal safe, and a garbage bag. State's Trial Exhibit P-10 shows the garbage bag, silver briefcase, and the personal safe after law enforcement had removed the items from the duffle bag. Inventory receipts created by law enforcement also show that the medical textbook was removed from the garbage bag that had been inside the duffle bag. State's Trial Exhibit P-12 is a picture of the medical textbook.

The bag and personal safe were then taken to the Sarasota County Sheriff's

Office evidence room where a complete inventory was done of the contents of the bag, except for the locked personal safe. Law enforcement then obtained a search warrant to open and search the locked personal safe. Items found pursuant to that warrant included coins, a Minnie Mouse key ring, a gold colored lock, and a men's Geneva watch.

Crime Scene Technician Jessica Jarecki testified at Mr. Smith's trial that she did go to Ms. Tajeda's residence at 3712 Bibko Circle in Sarasota County. She stated that the bag with the number 6 on it was removed from the attic at that residence. (ROA 2226). She stated the bag was removed from the attic and opened "just for a curtesy inventory." (ROA 2227). She photographed the open bag showing its contents. She took further photographs of the contents of the bag at the crime scene lab (State's Trial Exhibit 10), including the medical textbook. (State's Trial Exhibit 12).

During the evidentiary hearing the parties entered into a written stipulation concerning Jessica Jarecki. (PC-ROA 418-419). It stated as follows:

> 1. On September 16th, 2009, Ms. Jessica Jarecki went to 3712 Bobko Circle in her capacity as a Crime Scene Technician with Sarasota County Sheriff's Office.
>
> 2. While Ms. Jarecki was at that address that day, items were removed from

the attic of the residence that belonged to Delmer Smith, which he had asked Martha Tajeda to store at her residence.

3. Items in the attic were removed by Crime Scene Technician Jessica Hendrickson.

4. Included in the items removed from the attic on September 16th, 2009, was a red duffle bag. A photograph of this bag was taken by the officers at the scene as they first saw it, which was state's trial exhibit P-2 and P-3.

5. After the duffle bag was removed from the attic, it was opened by law enforcement officers. State's trial exhibit P-4 and P-9 depict the open bag as it appeared at the scene on September 16, 2009.

6. On September 18, 2017, 2009, at the crime scene lab Ms. Jarecki also photographed a medical textbook which had been removed from a garbage bag within the duffle bag, the one previously depicted in trial exhibit P-2 and P-3, and state's trial exhibit p-12. That's the picture of the bag in its open state.

7. To the best of Ms. Jarecki's knowledge at no time did law enforcement officers ever obtain or attempt to obtain a warrant to search the duffle bag located in the attic on September 16th, 2009, the one depicted in State's trial exhibit P-2 and P-3, prior to opening the bag and the removal of the medical textbook and silver personal safe from the bag – the silver safe depicted in

state's exhibit P-10.

8. The police did not a get a warrant to search the red duffle bag.

Law enforcement did not obtain a warrant to search the bag belonging to Mr. Smith found in Ms. Tajeda's attic. The warrantless search of the bag belonging to Mr. Smith and found in Ms. Tajeda's attic violated the Fourth Amendment to the United States Constitution. Once law enforcement has seized containers/luggage belonging to the defendant and had it exclusively within their control at the time of the search, without any exigent circumstances or possibility that that the contents could be removed before a valid search warrant could have been obtained, then the contents may not be searched without a warrant. *United States v. Chadwick,* 433 U.S. 1, S.Ct. 2476, FL L.Ed. 538 (U.S. 1977); *Liles v. State,* 375 So.2d 1094 (Fla. 1st DCA 1979); *Patterson v. State,* 402 So.2d 1190 (Fla. 5th DCA 1981); *Knight v. State,* 398 So.2d 908 (Fla. 1st DCA 1981); *Uleski v. State,* 379 So.2d 121 (Fla. 5th DCA 1979); *Cobb v. State,* 378 So.2d 82 (Fla. 3rd DCA 1979); *Rodriguez v. State,* 187 So.2d 841 (Fla. 2015).

Even though the state did obtain a warrant to search the contents of the personal safe, that safe was already the "fruit of the poisonous tree" because it had been obtained via a warrantless search of the duffle bag found in Martha Tajeda's attic -violating the Fourth Amendment. Furthermore, it cannot be said that law

enforcement was "in the process" of obtaining a valid warrant for the search of the duffle bag because nothing in the police reports or testimony indicate that law enforcement ever contemplated or attempted to obtain a warrant before searching the duffle bag. Under the *Rodriguez* case the doctrine of inevitable discovery would not be applicable. Likewise, the fact that Ms. Tajeda gave the police permission to retrieve the bag from her attic is of no import. A third party cannot validly consent to a search of personal property belonging to another "unless there is evidence of both common authority and mutual usage of the property." See *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *King v. State*, 79 So.3d 236 (Fla. 1st DCA 2012); *Kelly v. State*, 77 So.3d 818 (Fla. 4th DCA 2012); *State v. Miyasato*, 805 So.2d 818 (Fla. 2nd DCA 2001). *Ward v. State*, 88 So.3d 419 (Fla. 4th DCA 2012).

Therefore, had a timely motion to suppress been filed by counsel the medical textbook, Minnie Mouse keychain, coins, gold lock, and a men's Geneva watch could not have been used at Mr. Smith's trial.

In their response to the 3.851 motion the state asserted that Mr. Smith was not entitled to relief because he "had no reasonable expectation of privacy in stolen property," citing *Hicks v. State*, 929 So.2d 13 (Fla. 2nd DCA 2006); *Hendly v. State*, 58 So.3d 296 (Fla. 2nd DCA 2011); *State v. Lennon*, 963 So.2d 765 (Fla. 3rd DCA 2007) and *State v. Singleton*, 595 So.2d 44 (Fla. 1992). (State Response at p. 5).

However, none of the facts of those cases are applicable here. Those cases state that where the subject or area of a search has been stolen, i.e. the container, or the car, or a computer was stolen, then a defendant has no expectation of privacy and no warrant is necessary. In *Hicks* the police searched a stolen laptop computer. (*Id.* at 17). In *Lennon* the police search a jet ski that did not belong to the defendant). *Id.* at 772) In *Hendly* the police used a statutorily prescribed warrant to obtain a fraudulent prescription from a pharmacy. (*Id.* at 300). In *Singleton*, the police searched a car that was not owned by the defendant. (*Id.* at 47). Mr. Smith's case does not involve any evidence that the "area of the search," the red duffle bag, was stolen. In fact, the parties stipulated that Mr. Smith owned the red duffle bag and that he had asked Ms. Tajeda to store it for him. The police knew the duffle bag belonged to Mr. Smith as they had recorded the conversation between Mr. Smith and Ms. Tajeda where Mr. Smith asked her to get the bag and store it at her house. Nowhere at the trial or at the evidentiary hearing did the state present any evidence that the red duffle bag that was subject to the warrantless search did not belong to Mr. Smith. Thus, none of the cases cited by the state are applicable. The fact that the state may have had a suspicion that items **inside** the bag were stolen does not allow them to conduct a warrantless search of the bag. Such an interpretation would eviscerate the Fourth Amendment. Imagine the bank robbery case where the thief hid the money from the

bank in a locked box under his house. The police could simply enter the house and seize the box, without obtaining a warrant, because the money was "stolen." That is not the law. There is no state or federal jurisprudence which states that is the law. Mr. Smith's ownership of the bag was established in the record of the trial and stipulated to at the evidentiary hearing. Therefore, as a matter of law, he had a reasonable expectation of privacy in the bag and the police had no legal cause to search it.

At the evidentiary hearing, Trial Counsel Hernandez stated he did not file a motion to suppress because "the items that were at issue were stolen items from the victim and her family, and my understanding of the law is that a search warrant was not needed for either the items in the duffle bag, including the safe." (PC-ROA 1115). He said he "never seriously considered filing a motion to suppress." (PC-ROA 1116) Counsel further admitted he did not take the depositions of the crime scene technicians who opened the duffle bag. (PC-ROA 1118). Counsel admitted that during the trial the **state** had raised the issue of a possible 3.851 motion because counsel had not deposed any crime scene technicians or anyone who collected physical evidence belonging to the victim, Kathleen Briles.

None of the explanations cited by the defense counsel provide any legitimate strategic reason for not filing a Motion to Suppress the evidence found in the duffle bag. Counsel never even deposed any of the witnesses to determine their reason for

opening the bag without a warrant. Furthermore, counsel's statement that if the bag contained stolen items then no warrant is necessary is completely unsupported by any known Florida or Federal jurisprudence.

In *Strickland v. Washington*, 466 U.S. 668 (1984) the Court held that counsel has a "duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* requires a defendant to pled and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Smith pleads both. Counsel's performance was unreasonable in failing to file a motion to suppress which would have excluded key physical evidence introduced at trial. The Florida Supreme Court cited to this physical evidence in sustaining Mr. Smith's conviction for first degree murder stating "Inside the bag was a lock box that contained a coin collection in a plastic container, a Minnie Mouse keychain, a gold-colored lock, and a watch—all items that had been stolen from the Briles' home. At trial, Dr. Briles identified the items from the duffle bag, including the unique coin collection and the uncommon pewter Minnie Mouse keychain, even producing a receipt for the keychain. Attached to the Minnie Mouse keychain were keys to a vehicle that Smith owned. The medical encyclopedia was also recovered, and a fingerprint within the book was matched to Smith." *Smith* at 745. Had counsel filed a motion to suppress the evidence there is a reasonable probability of a different

outcome sufficient to undermine confidence in the guilty verdict against Mr. Smith. As both the deficient performance and prejudice prongs of *Strickland* have been proven, Mr. Smith requests that this court grant him a new trial on this claim.

CLAIM III

THE LOWER COURT ERRED IN DENYING THE APELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO TIMELY FILE AND ARGUE A MOTION TO SUPRESS EVIDENCE COLLECTED BY LAW ENFORCEMENT VIA AN UNCONSTITUTIONAL WARRANTLESS SEARCH AND SEIZURE OF THE CONTENTS OF MR. SMITH'S CELL PHONE

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review.

At Mr. Smith's trial the state called Detective Jerome Diamond of the Manatee County Sheriff's Office. A stipulation between counsel stated that Detective Diamond examined a cellular telephone which had been taken from the person of Mr. Smith on September 10, 2009. (ROA 1452) The cellular phone was entered into evidence in Mr. Smith's case as State's Exhibit # JD-1. (ROA 1453) Detective Diamond used a UFED device to conduct a forensic search of the cell phone while it was in police custody. (ROA 1454) The UFED report was entered into evidence

as State's Exhibit JD-2. (ROA 1455). Based upon the information contained in the UFED report (the mobile device number, provider, and the contact list with names and phone numbers) Detective Diamond obtained call detail and cell tower information from the cellular provider Metro PCS. (ROA 1463).

The Florida Supreme Court summarized the testimony of Detective Diamond based upon the evidence found during the forensic search of Mr. Smith's phone and the records subsequently obtained from Metro PCS as follows:

> The State presented evidence to establish that on 3:44 p.m. on the day of the murder, Smith's cell phone was at a location close to where the murder took place—a fact that was established when Smith's cell phone received a call that went unanswered and records indicated that his cell phone used a cell tower that was 1.24 miles away from the victim's home. This timing was particularly striking because the victim had left Publix at 3:38 p.m. and lived only a few minutes away from the store. Cell phone records further demonstrated that both before and after this time, Smith's cell phone was located close to where Smith lived in Sarasota County. The State also called numerous people who had called Smith's cell phone number or had received a phone call from Smith's cell phone number on the day of the murder. While none of the witnesses could recall specific telephone calls they made on August 3, nobody reported receiving a call from Smith's number from a person other than Smith. Similarly, nobody recalled calling Smith and having anyone other than Smith answer the call.

Smith at 751.

In *Smallwood v. State*, 113 So.3d 724 (Fla. 2013), a case decided on May 2nd,

2013, the Florida Supreme Court addressed the issue of the need for a law enforcement officer to search the contents of a cell phone taken from a defendant after his arrest. Following Mr. Smallwood's arrest, the arresting officer accessed and searched the contents of the data on the phone, revealing digital images. *Smallwood* at 730. The prosecutor thereafter obtained a search warrant to view the images on the phone. *Id*. Defense counsel objected to admission of the photos found on the phone, contending that although the State had obtained a search warrant before the prosecutor utilized the photographs, the State's actions did not cure the illegality of the initial search by the arresting officer. *Id*. At 731. In finding that the search violated the Fourth Amendment the Court stated:

> We commence our review by noting a longstanding tenet of United States Supreme Court precedent with regard to the Fourth Amendment:
>
> [T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."

Coolidge v. New Hampshire (1971) (emphasis supplied) (footnotes omitted).

> The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights both guarantee citizens the right to be free from unreasonable searches and

> seizures. The search and seizure provision of the Florida Constitution contains a conformity clause articulating the extent to which Florida courts are bound by federal interpretations of the *Fourth Amendment*. Article I, section 12, of the Florida Constitution provides, in full:
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in *evidence* if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Smallwood at 742.

The Court further stated:

> The United States Supreme Court held that the search of Gant's vehicle violated the Fourth Amendment. *See Id*. at 344. The Court first noted that a search incident to arrest only includes the arrestee's person and the area within his immediate control, i.e., the area into which he may reach to acquire a weapon or destroy evidence. *See Id*. at 339 (citing Chimel, 395 U.S. at 763). The Court then concluded that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, *both justifications for the search-incident-to-arrest exception are absent and the rule does not apply*." *Id*. (emphasis supplied). The High Court held that because Gant had been separated from his vehicle and was secured in a patrol car at the time of the search, the dual rationales for the search-

incident-to-arrest warrant exception were not present, and the officers were required to obtain a warrant before they could search the vehicle. *See id. at 335*. The Supreme Court concluded that because the officers failed to obtain a warrant, the search of Gant's vehicle was unreasonable under the Fourth Amendment. See *id*. at 351.

Gant demonstrates that while the search-incident-to-arrest warrant exception is still clearly valid, once an arrestee is physically separated from an item or thing, and thereby separated from any possible weapon or destructible evidence, the dual rationales for this search exception no longer apply. Applying Supreme Court precedent from *Chimel* and *Gant* to the instant case, we conclude that Officer Brown unquestionably was authorized to take physical possession of *Smallwood*'s electronic device used as a phone as part of the search incident to the arrest because the device was present on *Smallwood*'s body. *See Chimel, 395 U.S. at 762-63*. However, once the electronic, computer-like device was removed from *Smallwood*'s person, there was no possibility that could use the device as a weapon, nor could he have destroyed any evidence that may have existed on the phone. Accordingly, neither the officer protection nor the evidence preservation justification for the warrant exception applied. *See* Gant, 556 U.S. at 335. Thus, pursuant to *Gant*, Officer Brown was constitutionally required to obtain a warrant before searching the contents of, and the data in, *Smallwood*'s electronic device cell phone. *See also Coolidge, 403 U.S. at 454-55* (noting that searches without a warrant are per se *unreasonable*, and that exceptions to the warrant requirement are "jealously and carefully drawn") (quoting *Jones v. United States, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514, 1958-2 C.B. 1005 (1958))*. Because the State has not established that "the exigencies of the situation made [the search of the electronic device] imperative," *id. at 455* (quoting *McDonald v. United States, 335 U.S. 451, 456, 69 S. Ct. 191, 93 L. Ed. 153 (1948))*, we conclude that this exception to the warrant requirement was not applicable, and the search of *Smallwood*'s computer-like device violated the *Fourth Amendment*. There is no evidence or

> hint of evidence that this particular phone could be used as a weapon or that evidence could be destroyed remotely.

Id.

Application of the *Smallwood* case to Mr. Smith's case conclusively establishes that the "forensic search" of his cell phone by Detective Diamond violated the Fourth Amendment. Although the *Smallwood* was not decided until May 2nd, 2013, which was after the jury returned a guilty verdict against Mr. Smith, it was prior to the sentencing date of May 28th, 2013. Therefore, counsel could have raised the issue in a motion for new trial. Additionally, the Florida Supreme Court relied on existing United States Supreme Court precedent, which preceded Mr. Smith's arrest and conviction, in finding that law enforcement officer must obtain a search warrant before accessing information on a defendant's cell phone. It was incumbent on counsel for Mr. Smith to be aware of the federal precedents and file a motion to suppress the evidence seized from Mr. Smith's cell phone in order to preserve the issue. Additionally, the *Smallwood* case came before the Florida Supreme Court on a certified question from the First District Court of Appeals in *Smallwood v. State*, 61 So.3d 448 (Fla. 1st DCA 2011), so counsel should have been on notice of the issue and timely filed a motion to suppress the evidence obtained from Mr. Smith's cell phone by Detective Diamond as well as the evidence obtained from the Metro PCS as it was the "fruits of the poisonous tree."

At the evidentiary hearing trial counsel stated that he had received a report from the state that a Detective had conducted a forensic examination of Mr. Smith's cell phone and extracted the mobile phone number, list of contacts, and photographs. (PC-ROA 1100). Also, he admitted that there was no search warrant obtained by the Detective prior to conducting the forensic search of Mr. Smith's cell phone. (PC-ROA 1101). Counsel stated he did not file a motion to suppress the evidence obtained via the warrantless search because "at the time there was no basis for such a motion." (PC-ROA 1101). Counsel was shown the *Smallwood v State* case from the First district which had presented a certified question of great public importance to the Florida Supreme Court of "Does the holding in the *United States v. Robinson* case allow police officers to search photographs contained within a cellphone which is on an arrestee's person at the time of a valid arrest." (PC-ROA 1103). The docket entry from the Florida Supreme Court indicated it had taken jurisdiction to answer that question well before Mr. Smith's trial. (PC-ROA 1104, Defense Exhibit 12). Counsel stated that, had he known of the Florida Supreme Court accepting that question, he would have asked for a continuance but not filed a motion to suppress because of the law existing at that time. (PC-ROA 1104). Also, had he become aware of the Florida Supreme Court's ruling in *Smallwood* on May 2nd, 2013, which was prior to Mr. Smith's sentencing, he would have filed some sort

of motion with the court, but he was not aware of it. (PC-ROA 1106). Counsel further stated he was aware that the police located some of the people on the contact list which had been revealed during the warrantless search, and called them to testify in Mr. Smith's trial. (PC-ROA 1107).

Counsel's duties to Mr. Smith concerning suppression of the information obtained by the police via the warrantless search of his cell phone are clear. He should have been on notice that the Florida Supreme Court had accepted the certified question from the Third District on the issue of the necessity of a search warrant for information extracted from a cell phone. Based upon that he should have preserved the issue and filed a motion to suppress so when it was ruled on by the Florida Supreme Court there would be no retroactivity issue as Mr. Smith's case was not yet final. Also, once the Florida Supreme Court issued its opinion, counsel should have been on notice of the need to file additional motions for new trial. However, counsel did none of these things.

In *Carpenter v. State,*2017 Fla LEXIS 1433 (Fla. 2017) the Florida Supreme Court issued an opinion that is highly instructive on the issue of whether counsel should have been on notice of the pendency of the *Smallwood* certified question. In that case the police searched the defendant's cell phone without a warrant. His counsel filed a motion to suppress the evidence obtained from the phone based upon

Smallwood. The state argued that the search should have been allowed under the "good faith" exception to the exclusionary rule because the search of the cell phone was prior to the Florida Supreme Court decision in *Smallwood*. However, the Court held that because the search of the phone occurred **after** the 3rd District in *Smallwood I* had certified the question with regard to cell phone searches as one of great public importance, which placed law enforcement officers **on actual notice that the case was subject to further consideration**. (*Id.* at 1440). (*Emphasis added*). As the same time line applies here, surely the same principle of notice would apply imputing knowledge to experienced capital litigation counsel of the existence of the certified question before the Florida Supreme Court concerning searches of cell phones. His failure to act was ineffective assistance of counsel.

Regarding prejudice associated with the warrantless search of Mr. Smith's cell phone, it is important to note that the State introduced the Phone Examination Report as evidence at Mr. Smith's trial. It was introduced as Exhibit JD-2. (ROA 708-713). The state made great use of these records and called witnesses from Mr. Smith's contact list to establish calls were not made where anyone besides Mr. Smith picked up or answered the phone. This was done to negate any contention that Mr. Cellecz had borrowed Mr. Smith's phone on the day of the homicide. The defense had presented a theory that Mr. Cellecz was the true killer in the case.

Using the Phone Examination Report the state called a parade of witnesses from the phone contacts obtained from Mr. Smith's phone including Michelle Quinones (#45 on the contact list), Kim Osborne (#39 listed as "Kim Neighbor"), Joshua Koch (# 32)(ROA 2507), Brian Illyes (#19)(ROA 2513). Jack Jones (#27) (ROA 2516), Wesley Mills (#62) (ROA 2520, 2521), Robert Witte (#10) (ROA 2533-2535), Kimberly Jacques (#35) (ROA 2538-2539).

The Assistant State Attorney devoted not less than seven pages of his rebuttal argument going over the testimony of these witnesses found in Mr. Smith's contact list. (ROA 2633-2640), all to negate the defense that Mr. Cellecz was the killer. This evidence, along with the cell phone tracking made possible by the warrantless search of Mr. Smith's cell phone and recovery of the Mobile Device Number, was highly prejudicial to Mr. Smith. None of this evidence would have been admitted had counsel filed a motion to suppress in accordance with *Smallwood*.

In *Strickland v. Washington*, 466 U.S. 668 (1984) the Court held that counsel has a "duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* requires a defendant to pled and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Smith pleads both. Counsel had a duty to file a motion to suppress the evidence seized from Mr. Smith's cell phone by Detective Diamond. As outlined above, the Florida

Supreme Court relied upon this evidence in affirming Mr. Smith's conviction for first degree murder.

Had counsel filed a motion to suppress the evidence there is a reasonable probability of a different outcome sufficient to undermine confidence in the guilty verdict against Mr. Smith. As both the deficient performance and prejudice prongs of *Strickland* have been met, Mr. Smith requests that this court grant him a new trial on this claim.

CLAIM IV

THE LOWER COURT ERRED IN DENYING THE APPELLANT'S CLAIM THAT THE OPINION OF THE UNITED STATES SUPREME COURT IN *RILEY V. CALIFORNIA*, 134 S.CT. 2473, 189 L.ED. 2D 430, (U.S. 2014), HOLDING THAT LAW ENFORCEMENT OFFICERS MUST OBTAIN A WARRANT BEFORE SEARCHING A CRIMINAL DEFENDANT'S CELL PHONE, APPLIES RETROACTIVELY TO MR. SMITH'S CASE AND REQUIRES THAT THIS COURT GRANT HIM A NEW TRIAL

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review.

In *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed. 2d. (U.S. 2014), the United States Supreme Court stated:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they

> hold for many Americans "the privacies of life," *Boyd, supra, at 630, 6 S. Ct. 524, 29 L. Ed. 746*. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Riley at 154.

The United States Supreme Court has held that its constitutional decisions apply retroactively to all cases pending on direct appeal at the time of the decision. *Griffin v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed. 2d. 649 (U.S. 1987). Since *Riley* was decided on June 25th, 2014 and Mr. Smith's direct appeal opinion was not issued until July, 9th 2015, his case was pending on direct appeal at the time *Riley* was decided and he is entitled to retroactive application.

Applying the *Riley* case to Mr. Smith, he is entitled to a new trial on his first-degree murder conviction. Detective Diamond conducted a "forensic search" of his cell phone without getting a warrant – as specifically required in *Riley*. He obtained important information such as the Mobile Device Number (MDN) and the list of contacts and phone numbers. Detective used that information to obtain court orders to obtain the court orders for call detail and cell tower data from Metro PCS. It is important to note that respondent Wurie in the *Riley* case also had his cell phone searched and based upon the information obtained from the phone the police obtained a search warrant for a house. *Riley* at 2481. The court suppressed all the

evidence taken from the cell phone and all the evidence seized pursuant to the search warrant. The same result is mandated here, and all the evidence taken from the cell phone and later acquired from Metro PCS must be suppressed based upon binding United States Supreme Court precedent.

Additionally, it cannot be said that the error in allowing the evidence obtained from Mr. Smith's cell phone and Metro PCS is harmless error. The state relied heavily on the testimony of Detective Diamond concerning the location of Mr. Smith's cell phone and proximity of it to the Briles' residence at or near the time of the homicide. Specifically, the Florida Supreme Court stated:

> The State presented evidence to establish that on 3:44 p.m. on the day of the murder, Smith's cell phone was at a location close to where the murder took place—a fact that was established when Smith's cell phone received a call that went unanswered and records indicated that his cell phone used a cell tower that was 1.24 miles away from the victim's home. This timing was particularly striking because the victim had left Publix at 3:38 p.m. and lived only a few minutes away from the store. Cell phone records further demonstrated that both before and after this time, Smith's cell phone was located close to where Smith lived in Sarasota County. The State also called numerous people who had called Smith's cell phone number or had received a phone call from Smith's cell phone number on the day of the murder. While none of the witnesses could recall specific telephone calls they made on August 3, nobody reported receiving a call from Smith's number from a person other than Smith. Similarly, nobody recalled calling Smith and having anyone other than Smith answer the call.

Smith at 751.

In this argument Mr. Smith incorporates by reference his previous arguments in CLAIM II as to the prejudice associated with the State calling several witnesses obtained from Mr. Smith's contact list during the warrantless forensic search of his cell phone. For the same reasons argued herein the use of those witnesses to negate a defense put forth by Mr. Smith overcomes any "harmless error" argument put forth by the State. The retroactive application of *Riley* to Mr. Smith's case mandates a new trial.

Accordingly, Mr. Smith requests that this Court grant relief on this claim and order a new trial for his first-degree murder conviction.

CLAIM V

THE LOWER COURT ERRED IN DENYING THE APPELLANT'S CLAIM THAT COUNSEL FOR MR. SMITH WAS INEFFECTIVE FOR FAILING TO HIRE AN EXPERT WITNESS IN THE AREA OF THE TRACKING OF CELL PHONES AND CELL PHONE TOWERS TO COUNTER THE STATE'S EXPERT AT TRIAL WHO PROVIDED INACCURATE AND FORENSICALLY UNSOUND OPINIONS TO THE JURY AS TO THE TRACKING OF MR. SMITH'S CELL PHONE ON THE DAY OF THE HOMICIDE

STANDARD OF REVIEW

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review.

This Court summarized the state's presentation of cell phone and cell tower

data as follows:

> The State presented evidence to establish that on 3:44 p.m. on the day of the murder, Smith's cell phone was at a location close to where the murder took place—a fact that was established when Smith's cell phone received a call that went unanswered and records indicated that his cell phone used a cell tower that was 1.24 miles away from the victim's home. This timing was particularly striking because the victim had left Publix at 3:38 p.m. and lived only a few minutes away from the store. Cell phone records further demonstrated that both before and after this time, Smith's cell phone was located close to where Smith lived in Sarasota County. The State also called numerous people who had called Smith's cell phone number or had received a phone call from Smith's cell phone number on the day of the murder. While none of the witnesses could recall specific telephone calls they made on August 3, nobody reported receiving a call from Smith's number from a person other than Smith. Similarly, nobody recalled calling Smith and having anyone other than Smith answer the call.

Smith at 751.

The above information was provided to the jury via the testimony of Detective Jerome Diamond. Counsel for Mr. Smith did not hire an expert in cell phones and the tracking of them via cell phone towers. Had counsel done so evidence could have been presented to the jury that the opinions offered by Detective Diamond were forensically unsound. At the evidentiary hearing in this case the defense presented just such an expert witness in Robert Aguero.

After outlining his qualifications and experience in forensic cell phone and

tower expert testimony (PC-ROA 1064), Mr. Robert Aguero addressed the deficiencies of Detective Diamond's trial testimony. He reviewed the call detail records from MetroPCS and the cell tower information. (PC-ROA 1065) (Defense Ex. 4 -5). He also reviewed a map prepared by Detective Diamond (Defense Exhibit 7). He also prepared a map of his own (Defense Exhibit 6). Based on his review, Mr. Aguero stated that Detective Diamond's conclusions concerning tower 304 (the one near the Briles residence) was faulty in that the south facing sector was made very narrow, and the other two sectors were made very wide. (PC-ROA 1069-1070). He also stated that the only way to get the precise coverage area would be to obtain a radio frequency propagation map for each of the sectors or conducted a drive test of the area. (PC-ROA 1071-1072). As to the call from that tower on August 3, 2009 at 3:44 P.M. which lasted 8 seconds the only thing that can be accurately stated is that the phone making that call was within 30 miles of that tower. (PC-ROA 1073). Since the tower is facing toward the bridge it would be reasonable to expect that it covered that bride going across the bay. (PC-ROA 1074). Mr. Aguero specifically stated that Detective Diamond's trial testimony that "the furthest tower connection you're going to get is maybe 7 to 8 miles" was not accurate. (PC-ROA 1075). The actual maximum range is 30 miles. (PC-ROA 1074-1075) Therefore, the 3:44 call could have been made between a short distance (a few blocks) and 30 miles from the tower,

encompassing the area over the bay and Skyway Bridge. (PC-ROA 1076). Additionally, Mr. Aguero took issue with width of the sectors used by Detective Diamond, causing a very narrow range of coverage for the sector that the call at 3:44 P.M. utilized. (PC-ROA 1077).

The above testimony, had defense counsel chosen to hire an independent cell phone/tower expert, would have been very beneficial to Mr. Smith's case. As outlined above, Detective Diamond testified that the cell tower range of section 304 was only 7 or 8 miles, when in fact it could have encompassed up to a range of 30 miles according to Mr. Aguero, would have been of crucial importance to Mr. Smith's case. Instead, because the defense did not hire an independent cell phone/tower expert the jury was left with the unrebutted testimony that the 3:44 PM call to tower had to have been made from a phone within 7-8 miles of tower 304. Additionally, the very narrowing of the sector pointing it toward the Briles' residence was inaccurate and prejudicial. The use of a cell phone/tower expert such as Mr. Aguero would have raised reasonable doubt as to the location of the cell phone when the 3:44 call was made, as well as those from other towers throughout the day. As stated above the Florida Supreme Court made specific reference to the 3:44 call and its close proximity to tower 304 and the Briles' residence in affirming Mr. Smith's conviction. Because of counsel's failure to hire an independent expert

both the jury and the Florida Supreme Court were left with unchallenged evidence of the close proximity of Mr. Smith's cell phone to the Briles' residence at or near the time of the homicide. Counsel was ineffective for failing to obtain the services of an expert to challenge this crucial evidence.

At the evidentiary hearing defense counsel could provide no valid strategic reason for not hiring a cell phone/tower expert. He simply stated he "did not think it would be helpful" because "there was other evidence that put him in the general vicinity anyway." (PC-ROA 1109). However, the only testimony he could recite was other unchallenged cell phone activity which "showed Mr. Smith was traveling from North Port all the way up to Manatee County at the time the victim was at the grocery store." (PC-ROA 1110)

In summary, because the defense did not hire a cell phone and tower expert to inform the jury that there was no way to determine where the cell phone was located at 3:44 PM, and could have been in a large area west and southwest of that tower, nowhere near the Briles' residence, the jury was left with the inaccurate impression that the cell phone had to have been within 7-8 miles of tower number 304. (ROA 1521) This Court stated that the testimony of Detective Diamond concerning the close proximity of the phone to tower number 304 at 3:44 PM was "particularly striking" because the victim had left Publix at 3:38 p.m. and lived only a few minutes

away from the store. *Smith* at 751. The rest of Detective Diamond's testimony concerning the various locations of Mr. Smith's cell phone at various times on the day of the homicide suffer from the same infirmity. He testified as to the location of the phone at those times with a level of precision unsupported by industry standards regarding forensic cell phone tracking.

In *Strickland v. Washington,* 466 U.S. 668 (1984) the Court held that counsel has a "duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* requires a defendant to pled and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Smith pleads both. Counsel had a duty to challenge the state's case by hiring an independent cell phone and tower expert to review and challenge the conclusions and testimony of the state's expert. Had the defense done so there is a reasonable probability that the outcome of the proceedings would have been different sufficient to undermine confidence in the guilty verdict rendered against Mr. Smith for first-degree murder.

CLAIM VI

THE LOWER COURT ERRED IN DENYING THE APPELLANT'S CLAIM THAT IN LIGHT OF *HURST V. FLORIDA*, APPELLANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

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 sentence of death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *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 has 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 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 v. State*, 2016 WL 6036978 at *13.

The Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Smith's case. Although Mr. Smith's death recommendation was unanimous, even a unanimous death recommendation would not mandate a finding of harmless error, as that is only one of several inquiries that juries must make under *Hurst v. Florida*. The only document returned by the jury was an advisory recommendation that a death sentence should be imposed. Mr. Smith's penalty phase jury did not return a verdict making any findings of fact, so we have no way of knowing what aggravators, if any, the jurors unanimously found were 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. In *Hurst v. Florida*, the Supreme Court found:

> Florida concedes that *Ring* required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance." The State fails to appreciate the central and singular role the judge plays under Florida law…The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires. *Id*. at 622.

(Emphasis added).

In *Hurst v. State*, The Florida Court quoted the Supreme Court, "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact-finding. Florida's sentencing scheme … is therefore unconstitutional." The Florida Court went on to note, "In reaching these conclusions, the Supreme Court flatly rejected the State's contention that although '*Ring* required a jury to find every fact necessary to render Hurst eligible for a death penalty,' the jury's recommended sentence in Hurst's case necessarily included such findings." *Id*. at 622. (Emphasis added.)

The Circuit Court Judge who sentenced Mr. Smith to death expressed frustration at the state of the law at the time concerning the role of the jury and their recommendation and fact finding as follows in the sentencing order:

> Pursuant to Section 921.141 the trial judge is assigned the responsibility to weigh, independently of the jury, the aggravating and mitigating factors to determine whether death or life in prison without the possibility of parole is the appropriate sentence. Though some cases make it difficult to do so, the trial judge is required to give "great weight" to the recommendation of the jury. In this case the jury was instructed on five aggravating factors and two statutory mitigating factors. Non-statutory mitigating factors were also argued to the jury by defense counsel. Since the Florida Supreme Court decided *State v. Steele*, 921 So.2d 538 *Fla, 2006). The trial judge is left without any guidance as to which aggravating circumstances

> were found proved beyond a reasonable doubt and by what vote, what mitigating factors were established and by what vote, and whether there was majority agreement by the jurors on any individual aggravating factor. Despite this fundamental vagueness, the court must give undefined "great weight" to the jury's abstract finding. Given this background, the Court will proceed to the statutorily required analysis. (ROA 446).

The Circuit Court Judge's exacerbation at the Florida sentencing scheme in capital cases concerning the role of the jury was later remedied by the United States Supreme Court in *Hurst* in requiring the jury, not judges, make the findings of fact necessary to impose a sentence of death. In Mr. Smith's case the constitutional error is even more acute as the jury who recommended that Mr. Smith receive the death sentence never heard the important mitigating evidence produced by the defense at the *Spencer* hearing. Because the judge exclusively weighed the mitigating evidence presented at the *Spencer* hearing, and the jury never heard it, it cannot be said that the jury made the necessary finding of facts necessary for Mr. Smith to receive the death sentence. To engage in a harmless error analysis as to what a jury would have done if it had heard all the mitigating circumstances in the case, and been properly instructed as to its role, and required to find all the aggravating circumstances unanimously beyond a reasonable doubt, is pure speculation and not susceptible to a finding of harmless error.

Furthermore, as stated within this motion, Mr. Smith alleges that his penalty

phase counsel was ineffective for failing to investigate and present available evidence of mitigating circumstances. Therefore, it is likewise an exercise in speculation to try and determine how the jury would have voted had they heard the mitigation from the *Spencer* hearing and the mitigating circumstances competent counsel should have presented. Such a garbled mess of confusion does not represent appropriate due process and fundamental fairness guaranteed by the Fifth and Sixth Amendments to the United States Constitution and flies in the face of the letter and intent of the *Hurst* opinion.

Accordingly, Mr. Smith requests that this Court grant him a new penalty phase proceeding.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse his Conviction and Death Sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy in PDF format of the foregoing INITIAL BRIEF OF APPELLANT has been transmitted to the Clerk of the Supreme Court of Florida, through the Florida Courts E-Filing Portal, which will serve a Notice of Electronic Filing to: Christina Z. Pacheco, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013

at: Christina.pacheco@myfloridalegal.com and capapp@myfloridalegal.com. A hard copy will be sent by first class U.S. Mail to Delmer Smith III, DOC #135769, Florida State Prison, P.O. Box 800, Raiford, Florida 32083.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEL OF APPELLANT was generated by computer using Microsoft Word with Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.210 (a)(2).

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