Filing # 97045404 E-Filed 10/10/2019 01:19:05 PM

IN THE SUPREME COURT OF FLORIDA

JAMES T. COLLEY, JR.,)
)
Appellant,)
)
vs.) CASE NO. SC18-2014
)
STATE OF FLORIDA,)
)
Appellee.)
_________________________)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

STEVEN N. GOSNEY
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0180830
444 Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 254-3758
Gosney.steven@pd7.org
ATTORNEY FOR APPELLANT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Bvld., Suite 210
Daytona Beach, FL 32118
(386)254-3758
Burden.george@pd7.org
ATTORNEY FOR APPELLANT

RECEIVED, 10/10/2019 01:19:29 PM, Clerk, Supreme Court

TABLE OF CONTENTS

PAGE NO.

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

ARGUMENTS

POINT I 1

IN REPLY THAT THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT COMMITTED THE MURDERS IN A COLD, CALCULATED AND PREMEDITATED MANNER.

POINT II 6

IN REPLY THAT THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT'S MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

POINT III 13

IN REPLY THAT FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION.

POINT IV 15

IN REPLY THAT THE APPELLANT'S DEATH SENTENCE WAS DISPROPORTIONATE AND THIS COURT SHOULD VACATE THE DEATH

SENTENCE AND REMAND FOR A LIFE SENTENCE.

POINT V 16

IN REPLY THAT THE TRIAL JUDGE ERRED IN SENTENCING THE APPELLANT TO DEATH WITHOUT CONSIDERING VALID MITIGATION.

POINT VI 17

IN REPLY THAT THE APPELLANT'S DEATH SENTENCE MUST BE REVERSED AND A NEW PENALTY PHASE TRIAL ORDERED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY ON IMPROPER STATUTORY AGGRAVATION THEREBY TAINTING THE JURY VERDICT.

POINT VII 20

IN REPLY THAT THE JURY'S PENALTY PHASE VERDICT WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

POINT VIII 21

IN REPLY THAT THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT HAD IMPROPER AND INFLAMMATORY REMARKS, WHICH TAINTED THE JURY'S VERDICT AND RENDERED THE SENTENCING PROCEEDING FUNDAMENTALLY UNFAIR.

CONCLUSION 22

CERTIFICATE OF SERVICE 23

CERTIFICATE OF FONT 23

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Allred v. State 55 So.3rd 1267 (Fla. 2010)	7, 9-11
Alston v. State 723 So.2d 148 (Fla.1998)	5
Armstrong v. State 862 So.2d 705 (Fla. 2003)	18
Buzia v. State 926 So.2d 1203 (Fla. 2006)	5
Cheshire v. State 568 So. 2d 908 (Fla. 1990)	7
Cozzie v. State 225 So.3d 717 (Fla. 2018)	17, 18
Glebe v. Frost 674 U.S. 21 (2014)	18
Gonzalez v. State 136 So. 3d 1125 (Fla. 2014)	6
Hall v. State 87 So. 3d 667 (Fla. 2012)	6
Hernandez v. State 4 So. 3d 642 (Fla. 2009)	6
Hidalgo v. Arizona 138 S. Ct. 1054 (2018)	13, 14

Hurst v. Florida
202 So.3rd 40 (Fla. 2016) 19

Jackson v. State
704 So.2d 500 (Fla.1997) 5

Kopsho v. State
84 So.3d 204 (Fla. 2012) 4

Looney v. State
803 So.2d 656 (Fla. 2001) 4

Lowe v. State
259 So.3d 23 (Fla. 2018) 17, 18

Marquardt v. State
156 So.3d 464 (Fla. 2015) 1, 2

Proffitt v. Florida
428 U.S. 242 (1976) 13

State v. DiGuilio
491 So.2d 1129 (Fla. 1986) 18, 19

Zack v. State
753 So.2d 9 (Fla. 2000) 19

Zant v. Stephens
462 U.S. 862 (1983) 12

OTHER AUTHORITIES CITED:

Chapters 2010-120 s.1, 2005-28 s.7, 96-290 s.5, 95-159 s.1
91-270 s.1, 88-381 s.10, 87-368 s.1, Laws of Florida. 13

IN THE SUPREME COURT OF FLORIDA

JAMES T. COLLEY, JR., Appellant,	)	
vs.	)	CASE NO. SC18-2014
STATE OF FLORIDA, Appellee.	)	

POINT I

IN REPLY THAT THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT COMMITTED THE MURDERS IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The state argues that there was **more** than sufficient evidence for a finding of CCP. According to the state, Mr. Colley had to drive to his house where he armed himself with ammunition and at least two guns; and then reflect on what he was about to do. Likewise, Mr. Colley had to drive to the marital home, where he topped off his gas tank for his later getaway and parked in a surreptitious location. Finally, Mr. Colley could have stopped the shooting episode at any time but continued as part of his plan.

The state cited Marquardt v. State, 156 So.3d 464 (Fla. 2015), where this

Court upheld the CCP aggravator. The Marquardt case is easily distinguishable from the instant case. Marquardt was a "cold case" that was later solved through subsequently developed physical evidence. The physical evidence suggested that the crime was a seemingly random home invasion robbery where Marquardt planned to murder everyone in the house as a part of the robbery plan. The inferences drawn from the physical evidence were sufficient circumstantial evidence to support a finding of CCP.

In the instant case there is no dispute as to the circumstances that led to the murders. There is neighborhood surveillance video and audio 911 calls and telephone records that provide a specific timeline of events; there is a surviving witness to the beginning of the shooting; and there were the statements of the appellant to his mitigation experts. Unlike Marquardt, **the day of the murder** the appellant became emotionally distraught over his marital troubles. Leading up to the murder the appellant had a restraining order issued against him to stay away from the marital home, and a neighbor provided the appellant a picture of a man believed to be having an affair with his wife that made him suspicious. After a night of drinking, the appellant went to the marital home to check on his wife because she complained that she was not feeling well and missed their child's birthday party. He was also hoping to have sex. No one was home. The appellant

searched the bedroom and discovered bondage sex toys. The appellant became enraged and acted out in an emotional frenzy and ransacked the marital home because he now had confirmation that his wife was having an extramarital affair.

Hours later after a short nap and a cool down period, the appellant spoke with his wife on the telephone while driving to work. The appellant sought to make things right by offering to pay his wife for the damage he caused to the marital home and hoped they could work through their marital difficulties. The appellant's wife informed the appellant that "he" called police and reported the damage to the home, but that she was trying to fix it. (In fact, a law enforcement official arrived minutes later and the appellant's wife told law enforcement that she did not wish to press charges on her husband until she spoke with her lawyer.) The appellant learned that his wife's boyfriend called the police on him, and the appellant became upset again and diverted from going to work and returned to the marital home armed to confront his wife's boyfriend Lamar Douberly.

Upon arriving at the marital home, the appellant saw Douberly in the house. This visual confirmation caused him to have a panic attack. Appellant couldn't breathe, he had dizziness, weakness, and he felt like he was going to faint. Then, in an emotional frenzy, the appellant began shooting at Douberly from the backyard area. In the heat of passion after seeing Douberly in the marital home,

the appellant came into the marital home clearly seeking to kill Douberly, but Douberly fled through the garage. In the **seconds** that followed the appellant shot his wife's friend Lindy Dobbins in the head at point blank range, and consistent with an emotional frenzy shot his wife 9 times. This Court should be mindful that several months before this murder, Mr. Colley was a successful financial services professional, with a wife and children living in an upscale neighborhood in St. Johns County with no criminal history. His martial troubles initiated a downward life spiral; no one would have imagined that Mr. Colley could have committed a crime of this nature.

Based upon the foregoing, the murders in this case lacked cool calm reflection and lacked heightened premeditation. The cold element is generally found in those murders that are not committed in a heat of passion. See Looney v. State, 803 So.2d 656, 678 (Fla. 2001). The evidence in this case is overwhelming that Mr. Colley acted in the heat of passion, and out of rage relating to learning of his wife's infidelity and then learning that his wife's boyfriend was in the marital home and had involved the police in his marital discord **that day**. Contrast this with Kopsho v. State, 84 So.3d 204 (Fla. 2012) where Kopsho spent three days planning the murder of his wife after learning about her infidelity.

Heightened premeditation necessary for CCP was also lacking in this case

because the appellant's actions were not done after substantial reflection, and he did not act out a plan that he had conceived during the "**extended period** in which the events occurred." See Alston v. State, 723 So.2d 148, 162 (Fla.1998) (quoting Jackson v. State, 704 So.2d 500, 505 (Fla.1997)). Instead, the evidence supports a finding that the appellant came to the marital home in an emotional rage, and upon arrival the murders occurred in a matter of seconds. By contrast see Buzia v. State, 926 So.2d 1203 (Fla. 2006) where the time lapse that occurred between the beating of the first victim and the murder of the second victim involved a "deliberate ruthlessness" that allowed Buzia to reflect upon his criminal activity and to renounce any further violence. In Buzia, Mr. Buzia used the extended period of time in the house to perfect his plan of attack toward the murder victim. In the instant case, the appellant in the heat of passion sought to confront his wife's boyfriend, Mr. Douberly. Actually witnessing Douberly in his marital home put the appellant in such an emotional frenzy that the CCP aggravating factor simply does not apply.

POINT II

IN REPLY THAT THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT'S MURDERS WERE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The appellant concedes that the victim's knowledge of impending death may support a finding that the killing was especially heinous, atrocious, and cruel even if the death itself is quick. See Gonzalez v. State, 136 So. 3d 1125 (Fla. 2014); Hernandez v. State, 4 So. 3d 642 (Fla. 2009) Therefore, it is proper to consider the fear and emotional strain of the victim as contributing to the heinous nature of a murder supporting a death sentence even where the victim's death is almost instantaneous; and the victim's mental state may be evaluated for purposes of the determination of the heinous, atrocious, or cruel aggravator in accordance with a common-sense inference from the circumstances. See Hall v. State, 87 So. 3d 667 (Fla. 2012); Gonzalez v. State, 136 So. 3d 1125 (Fla. 2014)

A victim's suffering and awareness of his or her impending death certainly supports the finding of the heinous, atrocious, or cruel aggravating circumstance where there is a merciless attack. Id. However, as in the instant case, the evidence is entirely consistent with quick murders committed in the heat of passion and the exact events of the murders are a matter of conjecture, therefore, consideration of

the aggravating factor of heinous, atrocious, or cruel is improper. See Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

In the state's Answer Brief, the state reprints an excerpt from the trial judge's sentencing order and then argues that HAC applies based upon this Court's decision in Allred v. State, 55 So.3rd 1267 (Fla. 2010) In the initial brief the appellant explained that the Allred case is distinguishable from the instant case. Since the state appears to solely rely on the Allred case the particular facts of the Allred case merit further discussion.

In Allred, there was a party celebrating Allred's twenty-first birthday at his family's home, including his best friend Michael Ruschak and Allred's live-in girlfriend, Tiffany Barwick. Allred and Barwick had dated for about a year and lived together for the last several months. The relationship with Barwick, however, came to an abrupt and public end at the birthday party. When Barwick told Allred she "wanted her stuff back," Allred went to the room they shared, gathered her belongings, and began throwing them over the property's fence.

Allred subsequently learned that Barwick and Rushack had sexual relations and Allred became angry and began sending threatening messages to Barwick and Ruschak. In fact, Allred had used Barwick's picture for target practice at a shooting a range weeks before the murders. On the day of the murders, Allred told

Ruschak, “If [I] see you again, [I] will kill you, and yes that is a threat.” Finally, Allred and Barwick engaged in a heated and lengthy computer exchange on the day of the murder. Allred informed Barwick that he had hacked into her computer, changed the passwords, deleted files, and sent emails to people on her contacts list. He also transferred all of the funds in her bank account to pay her credit card debt. Calling her a “whore” because of her relationship with Ruschak, Allred said he could not forgive her for that and threatened, “[I]f I ever see [Ruschak] again I will kill him.”

That evening during a gathering of friends, Ruschak announced that he received a message from Allred and that Allred was coming to the gathering. Learning that Allred was coming, Barwick **went into full panic mode**. Soon Allred arrived and Ruschak locked the front door. Allred came to the back of the house and shot out the glass sliding door. Barwick, terrified, went to the bathroom, locked herself in and called 911. At the beginning of the call, Barwick tried to provide the 911 dispatcher with the necessary information. However, as the gunshots sounded in the background, she began to scream and hyperventilate. Allred saw Ruschak in the kitchen and shot and killed him. Allred then got into a confrontation with another guest, and eventually shot this person in the leg to get this person to leave him alone. Allred then went to the bathroom and killed

Barwick.

Based upon the facts above, this Court upheld the finding on HAC on the murder of Barwick because the victim Barwick's terror and fear of impending death lasted more than a few seconds, as evidenced by her 911 call. Her fear of impending death was proven by the communications with Allred earlier that day, by the knowledge that Allred was on his way to the house to confront her, by hearing the multiple gunshots fired at Ruschak; and b hearing the sound of a gunshot fired at a person that was trying to intervene. The state did not seek HAC on victim Ruschak.

In the instant case there are two victims where HAC was found and two 911 calls. The state did not identify which 911 call came from which victim's telephone. Reconstructing the video surveillance footage and the cell phone calls made by Mr. Colley to his father immediately before and after the shootings show that Mr. Colley was in the marital home for less than three minutes, and Mr. Colley's appearance was a total surprise. There was no fear and anticipation of Mr. Colley's arrival to the house as the victim experienced in Allred.

Lamar Douberly fled the house at 10:36:11; a long 911 call was made at 10:36:34; a short 911 call was made at 10:36:48; and Rachel Hendricks fled the house at 10:37:09. Neither victim spoke to the 911 operators, and the 911 calls

acted as a recording of the tragic shootings as they occurred. Mr. Colley shouted "Where the fuck is he?" and Amanda Colley's voice pleaded "He's not in there ... please stop ... Put that down ... put it down ..." Then the shooting inside the house started; Mr. Colley discharged 13 shots as fast as he could.

The shots to Lindy Dobbins while she hid in the closet killed her instantly. Prior to being shot Dobbins overheard the appellant and Amanda Colley arguing for a matter of seconds. Unlike Allred, Dobbins had not received any threats from Mr. Colley prior to this tragic shooting episode and had no idea he was coming to the house. Mr. Colley was a financial services professional with no criminal history, and Dobbins had reason to believe that Mr. Colley would ever engage in a mass shooting. Unlike Allred, the 911 call did not suggest that Dobbins was aware of her impending death prior to her being shot. This is not a murder where HAC applies.

Dr. Bulic testified that the autopsy of Amanda Colley revealed nine gunshot wounds, including a killing shot to the spinal cord. Dr. Bulic identified the killing shot to the neck artery and spinal cord as "immediately lethal." During the testimony (and contrary to the factual findings in the Sentencing Order), Dr. Bulic specifically stated, "forensic pathology is not, at this point, is not able to determine the -- the order in what -- in which the wounds are received. And, um,

so this is -- is basically impossible scientifically to determine that." Amanda Colley likewise did not experience the anguish experienced by Allred victim Tiffany Barwick. Barwick was notified that Allred was coming to the house and Barwick understandably "went into panic mode." Upon Allred's arrival, Barwick locked herself in the bathroom and called 911. For minutes Barwick suffered a panic attack and after hearing the initial gunshots hyperventilated fearing her impending death.

In the instant case, after Colley shot at Mr. Douberly from outside the house, Amanda fled to the bathroom and called 911. In less than a minute, you can hear Colley confronting Amanda and demanding to know where was her boyfriend. Amanda Colley is heard stating "put the gun down", and then she was shot 9 times in a frenzied attack. One of the shots was immediately lethal. The shooting of Amanda Colley was more like the murder of Michael Ruschak in Allred. In that case Allred sent a message to Ruschak and told him that he was coming to the house. Prior to this conversation, Allred had made several death threats against Ruschak. When Allred arrived at the house, Ruschak locked the front door to deny Allred entry. Allred then shot his way through the back of the house and shot Ruschak in the kitchen multiple times. The state did not seek the HAC aggravating factor for the murder of Michael Ruschak because HAC did not

apply. It did not apply for the murder of Michael Ruschak and it does not apply for the murder of Amanada Colley because of the swiftness with which the appellant killed her.

An aggravating factor must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of the same capital offense. Zant v. Stephens, 462 U.S. 862 (1983). If this Court endorses the trial judge's Sentencing Order relating to HAC for the murder of Lindy Dobbins and Amanda Colley, this aggravating factor has become an "automatic aggravating factor" in Florida that applies to every murder because in nearly every murder there are a few seconds where the victim becomes aware of their impending death. In this case we know precisely the time window of this tragic criminal episode. Reconstructing the video surveillance footage and the cell phone calls made by Mr. Colley to his father immediately before and after the shootings show that Mr. Colley was in the marital home for less than three minutes, and the actual gunfire by Mr. Colley took place in a time frame less of less than 58 seconds. As a matter of law this should be insufficient time for HAC to develop and apply.

POINT III

IN REPLY THAT FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE FLORIDA CONSTITUTION.

The state denies that there is a problem with the proliferation of aggravating factors in Florida. The death-sentencing statute approved in Proffitt v. Florida, 428 U.S. 242 (1976) contained eight aggravating factors. 428 U.S. at 251. By 2010, that number had doubled. See Chapters 2010-120 s.1, 2005-28 s.7, 96-290 s.5, 95-159 s.1, 91-270 s.1, 88-381 s.10, 87-368 s.1, Laws of Florida. It is difficult to conceive of a murder in Florida that does not fit at least one of the sixteen categories of eligibility. The trend in the states to add additional aggravating factors has not gone unnoticed by the United States Supreme Court. In Hidalgo v. Arizona, 138 S. Ct. 1054 (2018), four Justices commented on the Court's denial of certiorari. The Arizona Supreme Court had held that Arizona's capital scheme sufficiently narrows the class of people eligible for the death penalty even if it assumed that 98% of Arizona's first-degree murder cases are automatically eligible for death-penalty proceedings. The four Justices recognized “a possible constitutional problem” which “warrants careful attention and evaluation.” 138 S.

Ct. at 1057. In Florida, the reported cases and the relevant statutes on their face establish that the same problem found in Hidalgo exists in Florida. Florida's capital scheme fails to narrow the class of first-degree murderers eligible for death. For that reason this Court should reverse appellant's sentence and remand for imposition of a life sentence.

POINT IV

IN REPLY THAT THE APPELLANT'S DEATH SENTENCE WAS DISPROPORTIONATE AND THIS COURT SHOULD VACATE THE DEATH SENTENCE AND REMAND FOR A LIFE SENTENCE.

The appellant relies upon the initial brief in reply to the appellee.

POINT V

IN REPLY THAT THE TRIAL JUDGE ERRED IN SENTENCING THE APPELLANT TO DEATH WITHOUT CONSIDERING VALID MITIGATION.

The appellant relies upon the initial brief in reply to the appellee.

POINT VI

IN REPLY THAT THE APPELLANT'S DEATH SENTENCE MUST BE REVERSED AND A NEW PENALTY PHASE TRIAL ORDERED BECAUSE THE TRIAL COURT INSTRUCTED THE JURY ON IMPROPER STATUTORY AGGRAVATION THEREBY TAINTING THE JURY VERDICT.

The state argues that this Court has already determined that under Florida's new death penalty statute,[1] (which requires unanimity in a jury's death verdict) the erroneous instruction of an aggravating factor to the jury is subject to harmless error review:

> This Court has already found that even under Florida's new death penalty statute requiring unanimity in a jury's death verdict, consideration of an invalid aggravator is subject to harmless error review. See, e.g., Lowe v. State, 259 So.3d 23, 60 (Fla. 2018) ("Even if we were to conclude that the circumstantial evidence in this case was insufficient to prove the avoid arrest aggravator and that the aggravator should be stricken, any error by the trial court would be harmless."); Cozzie v. State, 225 So.3d 717, 729 (Fla. 2017) (Holding that even if an avoid arrest aggravator were stricken, the error would be harmless due the unanimous jury verdict and because the remaining aggravators still outweighed the mitigators).

Answer brief page 70. The state cites this Court's decision in Lowe v. State, 259 So.3d 23, 60 (Fla. 2018) and Cozzie v. State, 225 So.3d 717 (Fla. 2018). The

---

[1] The Florida Legislature passed the "new" death penalty statute requiring jury unanimity in September 2017.

appellant contends that these two cases have no precedential value because the penalty phase juries in both of those cases were instructed on the law that existed in June 2013 for the Cozzie case and September 2011 for the Lowe case.

Prior to the requirement of jury unanimity, the erroneous jury instruction on an aggravating factor was subject to harmless error analysis. See Armstrong v. State, 862 So.2d 705 (Fla. 2003) The appellant concedes that giving an erroneous aggravating factor instruction to a jury is not a structural error that if found would automatically require a new penalty phase trial. See generally Glebe v. Frost, 674 U.S. 21 (2014) ("Only the rare type of error—in general, one that 'infect[s] the entire trial process' and 'necessarily render[s] [it] fundamentally unfair'—requires automatic reversal.) Having concluded that an erroneous jury instruction on an aggravating factor is likely subject to harmless error review, this Court should conduct a harmless error analysis under Florida law.

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) this Court set forth the test for harmless error review in Florida, stating:

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

State v. DiGuilio, at 1138. Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. See, e.g., Zack v. State, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," DiGuilio, 491 So.2d at 1137, and the state bears an extremely heavy burden in cases involving constitutional error. As in a Hurst[2] error, the burden should be on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the erroneous jury instruction on an aggravating factor did not contribute to Mr. Colley's death sentence in this case. Put another way, the question is whether there is a reasonable possibility that the error affected the sentence. Diguilio at 1137. The appellant submits that under the facts and circumstances of this case, the state can not meet this heavy burden, and the appellant should be granted a new penalty phase trial.

[2] Hurst v. Florida, 202 So.3rd 40 (Fla. 2016).

POINT VII

IN REPLY THAT THE JURY'S PENALTY PHASE VERDICT WAS TAINTED BY HIGHLY INFLAMMATORY AND IMPROPER VICTIM IMPACT EVIDENCE, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

The appellant relies upon the initial brief in reply to the appellee.

POINT VIII

IN REPLY THAT THE PROSECUTOR'S PENALTY-PHASE CLOSING ARGUMENT HAD IMPROPER AND INFLAMMATORY REMARKS, WHICH TAINTED THE JURY'S VERDICT AND RENDERED THE SENTENCING PROCEEDING FUNDAMENTALLY UNFAIR.

The appellant relies upon the initial brief in reply to the appellee.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, appellant respectfully requests this Honorable Court to reverse the sentences of death and order a new penalty phase trial with a new jury, or in the alternative reverse the sentences of death with directions that the appellant be sentenced to life in prison.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ George D.E. Burden
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd. Suite 210
Daytona Beach, FL 32118
(386) 254-3758
ATTORNEY FOR APPELLANT
burden.george@pd7.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida, 32118, capapp@myfloridalegal.com and mailed to Appellant on this 10th day of October, 2019.

CERTIFICATE OF FONT

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

/S/ *George D.E. Burden*
GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER