IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC06-1903

STEPHEN SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

______________________/

APPELLANT'S REPLY BRIEF

On direct review from a decision of the Circuit Court of the Twentieth Judicial Circuit

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PRELIMINARY STATEMENT

This reply brief is being filed to respond to some of the State's arguments. By filing this brief, Mr. Smith does not waive any of the components of his initial brief. Additionally, by filing this reply brief, Mr. Smith does not concede any of the factual assertions or arguments made by the State in its answer brief.

REPLY ARGUMENT

ARGUMENT 1: FAILURE TO MAKE SUFFICIENT FINDINGS IN ORDER DENYING MOTION TO SUPPRESS

Due process requires trial courts to enter suppression orders with specific findings of fact and conclusions of law. Compare Geoghegan v. Geoghegan, 2007 WL 3390894 at *2 (Fla. 5th DCA, November 16, 2007) (vacating alimony order for lack of specific findings of fact which therefore inhibited appellate review – especially since there was divergent testimony on the issue.)

An order denying a motion to suppress most assuredly implicates more constitutional concerns that an alimony award. As a result, this court should hold that trial court orders must be specific on this issue.

The State argues on page 22 of its brief , but fails to cite to any authority, that this argument was waived because there was no contemporaneous objection in the trial court. First, there is no such requirement with this type of issue. Second, such a requirement would be practically impossible. There is nothing to contemporaneously object to. When the trial court entered its order the hearing was already over.

The trial court has the obligation to make sufficient findings of fact and conclusions of law in a suppression order in every case. Defendants should not be required to anticipate that the court will not enter such an order, and preemptively object. The defendant in this case had no crystal ball.

The State's also argues, without any accompanying authority, that the defendant must prove that he was prejudiced. This misses the point. This Court's appellate review is hindered and this is the due process violation in and of itself. For this reason, the defendant seeks remand, not reversal.

The court in J.C.G. v. Department of Children & Families, 780 So.2d 965 (Fla. 5th DCA 2001), vacated a dependency adjudication for failure to make specific findings of fact and rejected DCF's claim that this constituted harmless error because the record supported the trial court's ruling.

In sum, an appellant does not have to prove prejudice. In any event, the defendant was prejudiced because his treatment at the hands of prison officials made his subsequent confession involuntary because of the torture he was subjected to right before he was interrogated. Contrary to the State's suggestion, the defendant would surely be entitled to relief if this testimony was believed. This Court should not review this issue in the first instance.

A. THE DUE PROCESS CLAUSE OF THE FLORIDA CONSTITUTION PROVIDES MORE PROTECTION TO CRIMINAL DEFENDANTS THAN THE FEDERAL DUE PROCESS CLAUSE

This argument applies to every single one of the defendant's due process arguments in this case. This argument may exempt the defendant from prior precedent on a given issue because the prior decision only analyzed the issue under a federal microscope.

The doctrine of primacy states that this Court should review claims of constitutional violations under the Florida Constitution before it reaches the United States Constitution. B.H. v. State, 645 So.2d 987, 991 (Fla. 1994); Traylor v. State, 596 So.2d 957, 962-63 (Fla. 1992).

Florida's due process clause provides higher standards of protection than its federal counterpart. See State v. Griffin, 347 So.2d 692, 696 (Fla. 1st DCA 1977) ("Florida due process standards in many instances exceed federal standards as defined by the United States Supreme Court."). See also In re Forfeiture of Eight Thousand Four Hundred Eighty-Nine Dollars in U.S. Currency, 603 So.2d 96, 98 (Fla. 2d DCA 1992).

The people of Florida have chosen to give its citizens more rights and protections in the area of governmental encroachment on individual rights. This necessarily includes the fairness of trials and executions.

As noted in the initial brief, the court in M.E.K. v. R.L.K., 921 So.2d 787, 790 (Fla. 5th DCA 2006), held that the Florida Constitution provides higher standards of protection for parents in termination of parental rights proceedings.

The M.E.K. mandate applies with equal or more force when applied to the criminal defendant, who is protected by a fundamental liberty interest against confinement, and in this case, death. Therefore, the Florida Constitution provides more protection than the federal constitution when this interest is infringed upon.

The State cites to Troy v. State, 948 So.2d 635, 644 (Fla. 2006), for its position on this issue. This court did not resolve this issue in Troy. This Court was merely relaying what the Second District held on this issue in Barrett v. State, 862 So.2d 44, 48 (Fla. 2d DCA 2003), within the context of a voluntary intoxication defense.

This Court did not make a ruling on the protections of Florida’s due process clause as compared to the federal due process clause. It is still an open question.

ARGUMENT 2: INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO EVIDENCE THAT WAS THE SUBJECT OF THE SUPPRESSION HEARING

The State provides general axioms and argues on page 33 of its brief that this claim of ineffective assistance cannot be raised on direct appeal. Significantly, the State fails to say why an evidentiary hearing on this issue would be necessary or why the record is insufficient for this Court to review this issue.

The error is apparent on the face of the record. It is clearly deficient performance to attempt to suppress evidence and then fail to preserve the issue for appellate review. No trial strategy could ever justify this failure. The real question for this Court is whether the defendant was prejudiced.

The defendant readily accepts the State's position on pages 34-35 of its brief that trial counsel did not have to re-object to the evidence at trial. If this Court disagrees, then the defendant received ineffective assistance of counsel and should not have this issue procedurally defaulted due to trial counsel's failure to follow standard preservation procedures.

ARGUMENT 4: INEFFECTIVE ASSISTANCE FOR FAILING TO MOVE FOR A JUDGMENT OF ACQUITTAL

As with Argument 2, the State fails to explain how or why this argument cannot be raised on direct appeal. No evidentiary hearing would ever be needed on a claim of ineffective assistance for failing to move for a judgment of acquittal.

This is not an issue of trial strategy before the jury, it is a strictly legal argument in front of the judge. No evidentiary hearing is necessary. The record will be exactly the same after a 3.850 because the entirety of the State's evidence is already before this Court.

There is simply no excuse for not making a motion that would have won the case, either at the trial level or an appeal. It is an error that is apparent on the face of the record. See also pages 28-30 of initial brief.

A claim of ineffective assistance of counsel for failing to move for a judgment of acquittal is cognizable on direct appeal because the record is sufficiently developed. United States v. Almaguer, 2007 WL 2455291 at *1 (5th Cir., August 23, 2007); United States v. Greer, 440 F.3d 1267, 1272 (Fla. 11th Cir. 2006); In re Parris W., 770 A.2d 202, 207 (Md. 2001); People v. West, 719 N.E.2d 664, 680 (Ill. 1999); State v. Westeen, 591 N.W.2d 203, 207 (Iowa 1999);

State v. Denis, 678 N.E.2d 996, 998 (Ohio 6th Dist. 1996); Holland v. State, 656 So.2d 1192, 1197-98 (Miss. 1995); United States v. Rosalez-Orozco, 8 F.3d 198, 199 (5th Cir. 1993).

The appellate court should evaluate the sufficiency of the evidence as if counsel had moved for judgment of acquittal. Almaguer at *1; Rosalez-Orozco at 200. This is what this Court should do on this issue. This Court's review should remain de novo because the defendant should not be penalized for the ineffective assistance of his attorney.

The real question for this Court is prejudice. If the defendant would have been successful had the motion been made then it is automatically deficient performance for failing to make the motion and preserve the issue.

ARGUMENT 7: THE STATE UNFAIRLY TOOK INCONSISTENT POSITIONS ON WHO THE LEADER AND MASTERMIND OF THIS CRIME WAS

The State attempts to avoid appellate review of this issue by arguing on page 51 of its brief that the defendant cannot incorporate by reference the record-on-appeal in co-defendant Eaglin's case. This position should not be adopted

within the context of this issue because it would always allow the State to escape responsibility for its actions.

Any inconvenience in adopting the record in a case already before this Court does not trump the due process right the defendant has for relief on this ground. See also Fla.R.App.P. 9.200(f)(2), no proceeding should be determined based upon an incomplete record unless an opportunity to supplement has been provided.

The State argues that the defendant did not sufficiently preserve this issue for appellate review. While the defendant did not use the magic word "objection," he clearly alerted the trial court to the fact that the State took inconsistent positions on the two cases. This was sufficient. If it was not, then trial counsel was ineffective for failing to raise the issue. Secondarily, this is fundamental error and represents a miscarriage of justice.

Significantly, the State does not dispute the defendant's contention that the State argued that Eaglin was the leader and the mastermind of the crime during Eaglin's trial (including the penalty phase). Because the State argued that the defendant was the leader and the mastermind during his trial, and again on appeal, due process is violated.

The State's inconsistent position on this issue allowed it to unfairly obtain a death sentence on both cases. The State improperly elevated the defendant's role and improperly diminished Eaglin's role so that the defendant would stand out and be fingered for death. This does not pass constitutional muster.

The cases cited by the State are not applicable. Most notably, the State's cases involve guilt phase issues. The case at bar involves the penalty phase of a capital case. This is clearly different.

ARGUMENT 10: THIS COURT'S COMPARATIVE PROPORTIONALITY REVIEW OF SENTENCES OF DEATH IS UNCONSTITUTIONAL

This Court's proportionality review should include a review of cases in which a death sentence was imposed, cases in which a death penalty was sought but was not imposed, and cases in which the death penalty could have been sought but was not. This Court should also make a comparison to death sentences in other states and in federal cases. The Constitution does not stop at the state line.

All of this criteria must be utilized to achieve both statewide and national uniformity, to ensure that death is not "unusual," and to ensure that a death

sentence is not arbitrary. The failure to engage in this multi-faceted analysis deprives every capital defendant of a meaningful proportionality review.

The current review violates equal protection, violates the due process clauses of the Florida and United States Constitutions, and results in cruel and unusual punishments in derogation of Article 1, Section 17 of the Florida Constitution and the Eighth Amendment. As previously discussed, the Florida Constitution affords more protection to criminal defendants than the Federal Constitution.

The State faults the defendant for not providing precedent on this issue, but this question is one of first impression for this Court.

To pass constitutional muster, this Court must determine what level of aggravation is sufficiently low and what level of mitigation that is sufficiently high to raise concerns about arbitrariness and uniformity. This is impossible without objective empirical data about Florida's capital punishment system as a whole, and data from other jurisdictions as well. A defendant's chances of death should not vary based upon which jurisdictional border he has crossed.

This Court should impose mandatory data collecting procedures consistent with the suggestions herein. See Phillip L. Durham, *Review in Name Alone: The*

Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida, 17 St. Thomas Law Review. 299 (2004).

The ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." ABA Report at 211.

The ABA Report noted, "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 212.

The shift in the affirmance rate and in the manner in which the proportionality review is conducted is evidence of arbitrariness. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted. This Court's current limited scope of review presents an undue risk that death will be imposed in an arbitrary and discriminatory manner.

The United States Supreme Court has held that comparative proportionality review is not constitutionally required. See Pulley v. Harris, 465 U.S. 37, 44-54

(1984). Over time, this decision has proven itself to be violative of the Eighth and Fourteenth Amendments, and therefore should be overruled. See Tuilaepa v. California, 512 U.S. 967, 995 (1994) (J. Blackmun dissenting); Turner v. California, 498 U.S. 1053 (1991) (J. Marshall dissenting from denial of certiorari).

Florida's death penalty scheme does not provide the necessary constitutional safeguards to allow this Court's proportionality review to be so narrow. Florida is the only state that allows juries to find the existence of aggravating factors and allows the decision to impose death on a mere majority vote. This Court is constitutionally required to undertake a more comprehensive review as a result.

In addition, since this Court does provide at least some form of comparative proportionality review, this decision places the extent of its review under the Constitutional microscope. See Evitts v. Lucey, 469 U.S. 387, 401 (1985) (when a State opts to act in a field with discretionary elements it must do so in accord with the dictates of the Constitution, and in particular, the due process clause).

If this Court increased the body of evidence in its proportionality review, as suggested above, it would reverse the sentence of death in this case. This case is not consistent within Florida. See Lanzafame v. State, 751 So.2d 628 (Fla. 4th DCA 1999) (no death sentence for first degree premeditated murder where the

defendant, without provocation, hit the victim in the head with a baseball bat in excess of ten times).

This case is also not consistent with other states. See In re Elkins, 144 Cal.App.4th 475 (Cal. App. 1 2006) (defendant who was 19 years old when he robbed and killed his victim by repeatedly hitting him with a baseball bat did not receive a sentence of death, *and in fact was granted parole*). If this Court reviewed cases like this, it would be clear that the sentence of death in this case is disproportionate.

In addition, a defendant who killed five people by dousing them with gasoline and lighting them on fire was given a life sentence because he was a paranoid schizophrenic and suffered from extreme mental illness. See Ferry v. State, 507 So.2d 1373 (Fla. 1987).

Lastly, the State has misused the definition of "accomplice" (defined as "a person who helps another commit a crime") and argues on pages 72-73 of its brief that the defendant was not an accomplice because he planned to kill people during the escape. This misses the point that Eaglin actually killed Lathrem, thereby making the defendant an accomplice to the crime.

ARGUMENT 12: LETHAL INJECTION ITSELF AND FLORIDA'S LETHAL INJECTION PROCEDURES ARE UNCONSTITUTIONAL

Trial counsel was ineffective on this issue because the United States Supreme Court is about to strike down executions by lethal injection as currently implemented by states such as Florida. Had this issue been preserved for appellate review the defendant would have been able to attain relief – therefore he is prejudiced.

The key here is that trial counsel *clearly* and *unequivocally* intended to pursue this issue, and in fact did so, but erroneously thought the trial court denied the motion on the merits, thereby preserving the issue for appellate review. The defendant should not be procedurally defaulted for this mistake. The failure to preserve the issue is deficient performance.

After the initial brief was filed this Court decided Lightbourne v. McCollum, 2007 WL 3196533 (Fla., November 1, 2007), where this Court upheld the constitutionality of Florida's lethal injection procedures as currently administered.

In the initial brief on page 54, the defendant incorporated by reference the record-on-appeal in Lightbourne. The defendant asks this court to judicially notice

said record as it did in Schwab v. State, 2007 WL 3196523 at *2 (Fla., November 1, 2007).[1]

To be clear, the defendant is challenging the inherent per se unconstitutionality of lethal injection itself as cruel and inhumane, in violation of *inter alia*, Article I, Section 9 of the Florida Constitution (See Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn. 2007) – as well as challenging the fact that Florida's implementation of lethal injection presents an unnecessary risk of pain and suffering.

The new May 2007 and August 2007 lethal injection protocols promulgated by the Department of Corrections after the defendant was sentenced (but will be applied to him), do not sufficiently minimize the risk of pain and suffering in lethal injection executions.

The dispostive standard on this issue should be whether the method of execution creates an unnecessary risk of pain and suffering (as opposed to a substantial risk of the wanton infliction of pain). Regardless, Florida's procedures do not comply with either standard.

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[1] A stay of execution for Mr. Schwab was granted on November 15, 2007 by the United States Supreme Court. Case No. 07A383.

Florida's procedures are also unconstitutional because there are readily available alternatives that pose less risk of pain and suffering. Other chemicals and procedures can be implemented, as an alternative to Florida's current cocktail and procedures, which pose less risk of suffering. Using the least restrictive alternative is constitutionally required.

The continued use of the three drugs – sodium thiopental, pancuroniam bromide, and potassium chloride – individually or together, also violate the proscription against cruel and unusual punishment.

All of these issues are currently pending with the United States Supreme Court in Baze v. Rees, 217 S.W.3d 207 (KY. 2007), *cert. granted*, 2007 WL 2075334 (U.S. Sup. Ct., September 25, 2007) (07-5439). It is requested that this Court not rule until Baze is decided. Lightbourne does not resolve all of the arguments presented in the case at bar.

DOC's current procedures are also insufficient because the consciousness assessment needs to meet a clinical standard using medical expertise and equipment and a one-drug protocol utilizing only a lethal dose of sodium pentothal

(sodium thiopental) is a less restrictive, and more humane, alternative.[2]

Currently, Florida courts are providing too much deference to DOC on these issues. Precedent on this point will most likely change after the United States Supreme Court decides Baze. This Court will then have a new freedom to do what's right – something DOC is apparently unwilling or unable to do.

ARGUMENT 17: CUMULATIVE ERRORS

This Court considers the cumulative effect of evidentiary errors and ineffective assistance claims together. Suggs v. State, 923 So.2d 419, 441 (Fla. 2005).

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[2] See Schwab v. State, 2007 WL 3286732 at fn 3 (Fla., November 7, 2007) (J. Pariente concurring), noting that the one-drug protocol was recommended by Tennessee's protocol committee but was not adopted. See Harbison v. Little, 511 F.Supp.2d 872 (M.D. Tenn 2007).

CONCLUSION

For all the foregoing arguments and authorities, the Appellant/Defendant, Stephen Smith, respectfully requests this Honorable Court to expand its comparative proportionality review and reverse his convictions and remand for a new trial/penalty phase, or reduce his sentence to life imprisonment without the possibility of parole.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Office of the Attorney General, Attn: Stephen D. Ake, Esq., Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 on this 19th day of November 2007.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with Times New Roman 14-point font in compliance with Fla.R.App.P. 9.210(a)(2) on this 19th day of November 2007.

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