IN THE SUPREME COURT OF FLORIDA

RUSSELL HUDSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. SC06-748
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court
Of the Seventeenth Judicial Circuit
In and For Broward County, Florida

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ARGUMENT

1. WHETHER THE COURT ERRED IN ALLOWING HEARSAY TESTIMONY ABOUT PRITCHARD'S CONVERSATION WITH PELLER.

A. The testimony was inadmissible under the spontaneous statement and the excited utterance exceptions.

The answer brief (AB) says that the evidence was admissible under the spontaneous statement or the excited utterance exception to the hearsay rule. The record does not support this argument.

As to spontaneous statements, AB 51-53 cite cases involving extreme stress or agitation.[1] Appellee shows no similarity between such cases and the case at bar except to present an imaginary scene in which Peller "cowered in the bathroom" making a "cry for help" while appellant was "standing in Peller's apartment." The judge made no such findings, and the record

[1] See Garcia v. State, 492 So. 2d 360, 365 (Fla. 1986) (wounded victim's "response was spontaneous, sprang from the stress, pain and excitement of the shootings and robberies, and was not the result of any premeditated design."); Williams v. State, 198 So. 2d 21, 23 (Fla. 1967) (victim had been shot); State v. Adams, 683 So. 2d 517, 519 & n.2 (Fla. 2d DCA 1996) (declarant had just witnessed death by shotgun blast); McDonald v. State, 578 So. 2d 371, 373-74 (Fla. 1st DCA 1991) ("It was undisputed that the victim made the statement to her friend immediately after the attack, and that she was 'hysterical and crying' when doing so."); McGauley v. State, 638 So. 2d 973 (Fla. 1994) (woman spoke immediately after seeing her husband flee through window as officer approached); Bartee v. State, 922 So. 2d 1065, 1070 (Fla. 5th DCA 2006) (statements immediately after defendant hit victim and threatened to snap her son's neck). As discussed in the initial brief, Viglione v. State, 861 So. 2d 511, 513 (Fla. 5th DCA 2003) sets out so few facts that one cannot say how it could apply at bar.

does not support appellee's presentation.

Pritchard's account negates the claim that Peller was cowering: he was calm and untroubled. Further, the claim about Peller calling from the bathroom came only from Pritchard's saying he heard a sound like a bathroom exhaust fan. Faley, Webb, and Fizzuoglio were familiar with the apartment, and they and various detectives spent time there on the night of the murder, yet none of them testified that Peller's bathroom even had such a fan or whether other rooms (like the kitchen) might have had fans. Also, Faley testified to hearing "wind blowing in, it's kind of like static or you just hear stuff on the phone." T6 723. Finally, there was no evidence as to what appellant was doing while Peller called Pritchard, except that he clearly did not interfere with the call.

Further, under appellee's scenario, Peller had lots of time to reflect and did reflect: he decided that he should call Pritchard, and that he should retreat to the bathroom where he made the call, and he then discussed the matter at length with Pritchard. Hence, the various statements of Peller during the fifteen minute call were not "spontaneous statements" under the Evidence Code.

Appellee next argues that Peller made excited utterances. But the record shows that he was not excited, he was perfectly calm. Tucker v. State, 884 So. 2d 168 (Fla. 2d DCA 2004) does

not help appellee in this regard. At Tucker's trial for assault and other crimes, the judge allowed the victim's telephone call into evidence as an excited utterance. The Second DCA reversed because the judge did not make necessary predicate findings. In **dicta**, it expressed doubt that the victim was excited, but wrote that the trial had a superior vantage point **because it had an opportunity to personally observe the victim-declarant testify in court.** Hence, it wrote that on remand the state **might** be able to lay a predicate that the witness was excited when making the call. At bar, the judge had no superior vantage point. Instead, **Pritchard** had the superior vantage point because he knew and spoke to Peller, and his testimony showed Peller was calm and self-assured.[2]

B. Appellee has failed to meet its burden as to prejudice regarding the verdict as to guilt or innocence.

As to prejudice, appellee minimizes Pritchard's testimony, referring to "the weakness of the connection between Pritchard's testimony and Defendant's guilt". The jury and judge, and even the trial prosecutor, would be amazed by this pooh-poohing of such an important witness's testimony. The prosecutor proffered

[2] Appellee also cites Williams v. State, 32 Fla. L. Weekly S347, S350, 2007 WL 1774389 (Fla. June 21, 2007), which does not affect the case at bar. The victim there had suffered a violent attack in which she was raped, bitten, and stabbed, and no one testified that she was calm. AB 56 has a string citation to cases involving 911 calls, which have no bearing on the Peller's perfectly calm conversation with Pritchard.

the testimony and argued hard for its admission, T5 567-84, 649-53; he discussed it in detail in his opening statement, T6 679-81; he strategically positioned Pritchard as his first witness; and he relied on his testimony in final argument. T16 2061-62, 2085. The jury could reasonably have considered Pritchard's testimony a major part of the case for guilt. Appellee has not shown beyond a reasonable doubt that it did not affect the verdict.

AB 57 argues an incorrect standard for prejudice, saying there was ample other evidence of guilt. Appellee cannot meet its burden with such argument as the test "**is not** a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.", State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986) (e.s.). This Court wrote in Goodwin v. State, 751 So. 2d 537, 542 (Fla. 1999) (e.s.):

> Thus, the reviewing court **must resist** the temptation to make its own determination of whether a guilty verdict could be sustained by excluding the impermissible evidence and examining only the permissible evidence.

Here, appellee chose to present the improper evidence and argue it to the jury with an aim to influence the jury. Its brief in this Court has not shown that it failed in its aim.

Further, the claim of ample other evidence rests on

contested claims and unclear evidence based largely on Fizzuoglio's testimony[3] and inconclusive matters of circumstantial evidence which were explained in appellant's testimony. The fact that there was a large amount of contested evidence does not support a claim of harmless error.

Also, the record refutes argument at AB 58 that the defense contended that Dilger was the murderer. At most, appellant said

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[3] At AB 57 and elsewhere in its brief, appellee says Fizzuoglio, appellant, and Peller were together in the apartment for an hour before the shooting. AB 57 ("Fizzuoglio gave an eyewitness account of the last hour of Peller's life and how Defendant spent that hour holding her and Peller at gunpoint, with a gun Defendant had with him, as Peller tried to convince Defendant not to kill him or Fizzuoglio."), 37 ("They were in the apartment for more than an hour."), 74 (Fizzuoglio had ample opportunity to observe Peller's demeanor "in the hour she spent in Peller's apartment Peller expressed concern for her safety"), 80 (appellant "spent the last hour before the murder holding the victim at gun point"), 87 ("Over approximately the next hour, the parties discussed the murder of Peller."). The record does not support this assertion, and it is inconsistent with appellee's own argument in its brief.

Fizzuoglio said she was in the apartment for about an hour, T18 2249, but she and appellant spent an unknown amount of time in the apartment after the shooting, as which appellant searched the apartment and they both did cocaine. Further, the state contends elsewhere in its brief that Webb called Peller within a few minutes of Fizzuoglio's entry into the apartment before appellant produced the gun. AB 2 (shortly after Fizzuoglio entered, "Peller received a phone call from Brandon Webb"), 82 ("Fizzuoglio's testimony showed that Webb's call was made before the gun was produced and the lack of noticeable anxiety in one's voice does not indicate a lack of anxiety."). But Webb made the call at 9, only 15 minutes before the murder. T6 721. Additionally, Fizzuoglio encountered Deputy Bauer almost immediately after leaving the apartment, and Bauer put the time at 10:10 p.m. T8 1048. Thus, if Fizzuoglio spent an hour at the apartment, she arrived only within a few minutes of the murder, which happened around 9:15.

that at the time he spoke with the police he thought that Dilger or Mejia might had been involved. T15 1970. Contrary to AB 33, appellant did not claim at trial "that he was now blaming Dilger and Mejia because Mejia had been deported." He contended at trial that he was innocent, and that Mejia was involved in planning the murder, which was committed by Mejia or one of Mejia's cohorts. The jury heard evidence that Mejia was at Moreau's apartment a five minute walk from Peller's on the night of the murder. T12 1519-20, 1560. Also, the complex's guard log showed "Philippe and Jennifer" arrived at 9:10, just before the murder. T10 1367-68. Finally, so far as the answer brief fleetingly relies on Coyne's testimony, that testimony was little relied on below, perhaps because appellee's statements to Coyne had little inculpatory value, and efforts to establish an alibi hardly negates innocence.

C. Appellee has failed to meet its burden as to prejudice regarding the sentence.

Contrary to AB 60, appellee did not use Pritchard's testimony at penalty to establish Peller's state of mind. Rather, it used it to establish a time line from which it constructed a theory of a two-hour ordeal. Peede v. State, 474 So. 2d 808, 816 (Fla. 1985) does not bear on this issue. There, direct evidence of the victim's state of mind was admitted under section 90.803(3). Appellee made no claim below of admissibility under 90.803(3), and cannot make such a claim at

this late stage of the case since appellant had no opportunity to oppose such a theory or get a limiting instruction when the evidence was admitted. Cf. Robertson v. State, 829 So. 2d 901 (Fla. 2002) (state may not argue limited theory of admissibility for first time on appeal if defense did not have chance to contest theory below or get limiting instruction). Regardless, Pritchard's testimony was not admissible under Peede since it was admitted to establish the time line rather than as direct evidence of Peller's state of mind.

Likewise, appellee can get no benefit from Garcia v. State, 949 So. 2d 980, 993 (Fla. 2006) (introduction of payroll records waived any objection to premature rebuttal evidence regarding records) and Valle v. State, 581 So. 2d 40, 46 (Fla. 1991) (erroneous admission of anticipatory evidence of lack of remorse harmless in light lack of mitigation and other circumstances of the case).

Finally, as to the argument at AB 60 of lack of prejudice at penalty, one need only look to the answer brief to see the integral role of Pritchard's testimony in the state's case for death. The answer brief again and again emphasizes the testimony in dramatic terms in arguing penalty issues. AB 75 ("Peller had called Pritchard for help while cowering in his bathroom because Defendant had announced his intention to kill Peller about two hours earlier"); AB 83 (Peller maintained "a

veneer of calm when he spoke to Pritchard as he cowered in his bathroom"), id. (Pritchard's testimony that "Peller expressed his hope that he could convince Defendant not to kill him" supported the judge's findings as to HAC); AB 80 (appellant "announced his intention to kill a victim two hours before the murder"; AB 78 (findings as to HAC were supported by Pritchard's testimony that "that Peller called him around 7 p.m. saying that someone was in his apartment to kill him"); AB 88 ("the testimony of Pritchard" supported CCP).

2. WHETHER THE COURT ERRED IN ALLOWING ERNESTO GONZALEZ'S STATEMENT THAT APPELLANT STOLE PELLER'S GUN.

A. Gonzalez's hearsay statement could not be used on cross-examination of appellant.

Regardless whether, as AB 61 says, appellee could cross-examine appellant about differences between **Stromoski's testimony** about the gun and appellant's testimony, the cases cited at AB 61 do not make proper the cross-examination at bar. At bar, the state put before the jury **Gonzalez's hearsay** statement inculpating appellant. In fact, Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1987), on which appellee relies, held that **one may not cross-examine a witness about such hearsay**: "The trial court found that each of the questions to which the state objected was irrelevant **or called for hearsay testimony**. After careful review of the record, we find no abuse of discretion." See also Andalora v. Lindenberger, 576 So. 2d 354

(Fla. 4th DCA 1991) (in defective construction suit, defendant contractor could not impeach plaintiff's expert with letter written by third party saying that roof and shingles were properly built: "The conclusion is inescapable that the document was used, albeit surreptitiously, to assert the truth of the matter contained therein."); Harrolle v. State, 235 So. 2d 44 (Fla. 3d DCA 1970) (state's witness could not be cross-examined about statements made by third party); Jones v. State, 256 So. 2d 46, 47 (Fla. 3d DCA 1971) (same).

Izquierdo v. State, 890 So. 2d 1263, 1266 (Fla. 5th DCA 2005) does not help appellee. There, the defendant's wife was properly impeached with **her own prior inconsistent statements**.[4] Izquierdo hardly says that one can introduce the hearsay of other persons to impeach a witness: otherwise, **the defense could present the defendant's exculpatory statements**, and even the exculpatory statements of other non-witnesses, during the testimony of the state's witnesses, contrary to Andalora, Harrolle and Jones.

Appellant did not invite the improper cross-examination under San Martin v. State, 705 So. 2d 1337, 1348 (Fla. 1997). There, the defense elicited a psychiatrist's opinion, over the

[4] Similarly, California v. Green, 399 U.S. 149, 158 (1970) simply said that the constitution does not forbid the presentation of a **witness's own prior inconsistent statement** if the witness is given an opportunity to explain or deny the prior statement.

state's objection, that a borderline personality disorder could be mitigating only if it prevented the defendant from knowing what he was doing was wrong. Hence, there was no error when the state asked the **same witness** whether mental mitigators applied to San Martin. In fact, San Martin seemed to argue that the expert had used an incorrect legal standard even though **defense counsel** presented that incorrect legal standard over the state's objection. Appellee makes no effort to show how San Martin applies at bar.

The state's claim of invited error gets no support from the record. The state doggedly pursued the matter, asking appellant: "No idea who stole that gun?", "Do you know?", "Do you know?", "Now you do? Who stole the gun?", "How do you know that?", "His statement? Ernesto Gonzalez admits to stealing that gun in his statement?", "With who?" T15 2011-12. Appellant's answers were directly responsive to the state's questions.

Where, as here, the answers are responsive to the question, **the questioner** has invited the answer and **not the witness**. See Sneed v. State, 736 So. 2d 1274, 1275 (Fla. 4th DCA 1999) (when defense asked why Sneed's photo was in lineup, officer's responsive answer that anonymous source had identified Sneed was **invited by question**). Thus, in Thompson v. State, 648 So. 2d 692, 695 (Fla. 1994), **the questioner** (in this case, defense

counsel) **invited the response** when he asked a witness "When did your crew see [the defendant]?" and the witness replied that the crew saw the defendant kidnapping the victims with a gun in his pocket. Thus, at bar, **appellee, the questioner**, invited the error.

B. Appellee has failed to meet its burden as to prejudice.

As AB 63-64 concedes, appellee used the evidence to attack appellant's credibility. Although AB 64 says appellant's credibility was "in shambles," such argument has no force.

The evidence was hardly conclusive as to guilt, and the objective evidence contradicted the state's theory. First, DNA on the latex gloves in the apartment showed that they **could** have been handled by Peller, appellant, Fizzuoglio, Faley, or Webb, but also that they **were** handled by **someone other than those persons**. T10 1231. Second, blood on Fizzuoglio's shirt **did not match** her, appellant, Peller, Faley or Webb. T10 1234-35, 1240-41. Third, Peller's car was warm, indicating that someone had used it around the time of the murder or shortly thereafter, a fact that contradicts the state's theory that Peller and appellant were in the apartment for two hours before the murder and that appellant and Fizzuoglio then left together in her car.

AB 64 puts great reliance on Stromoski's testimony about the gun in the bag, but the jury could easily give his testimony little weight because of his vague description the brief time he

saw the gun. Also, the evidence that Gonzalez said appellant stole Peller's gun served **not only** as bad character evidence, but also to put the murder weapon in appellant's hand and support the claim that appellant actively took part in Mejia's plan to murder Peller.

AB 64-65 briefly claims lack of prejudice as to penalty. Appellant agrees that appellee based its case for CCP on the claim that appellant joined in the plan to kill Peller weeks before the murder. Thus, appellee's case **was strengthened**, and the defense **was prejudiced**, by hearsay evidence that appellant stole the murder weapon with Mejia's henchman Gonzalez. The evidence could reasonably have contributed to the bare minimum 7-5 death verdict.

3. WHETHER IT WAS ERROR TO LET THE STATE COMMENT ON APPELLANT'S FAILURE TO TESTIFY AGAINST OTHERS.

AB 65 says: "This Court has held that for the State to have improperly commented on a defendant's exercise of his right to remain silent, it is necessary for the defendant to have actually remained silent." While this general statement is true so far as it goes, the cases cited by appellee have no bearing on the case at bar. Hutchinson v. State, 882 So. 2d 943, 955 (Fla. 2004), held that testimony that an officer spoke with the defendant **on the night of the murder** did not comment on the defendant's **not testifying at trial**. In Downs v. Moore, 801 So. 2d 906, 911-12 (Fla. 2001), no issue was preserved for appeal,

and in any event the state simply made a comment on what the defendant **did tell the police**. In Valle v. State, 474 So. 2d 796, 801 (Fla. 1985), held only that a refusal to answer one question did not amount to invocation of the right to remain silent. None of these cases say that, once the defendant has talked to the police at the time of his arrest, the state may later comment on his failure to make other statements or testimony on another occasion or in later proceedings, and appellee makes no effort to dispute that Simpson v. State, 418 So. 2d 984 (Fla. 1982) forbids commenting on a defendant's failure to testify at a separate proceeding even if the defendant testifies at trial.

AB 65-66 says appellant did not exercise his right to remain silent "at any point prior to the comment," a claim that the record flatly contradicts: appellant's written invocation of his right to remain silent was filed on November 7, 2001. R1 6.

4. WHETHER THE COURT ERRED IN DENYING THE DEFENSE'S REQUESTED JURY INSTRUCTION ON HAC.

AB 68 notes that this Court has repeatedly upheld the standard instruction on HAC. But the cases it cites do not involve the specific issue before this Court. Hoskins v. State, 32 Fla. L. Weekly S159, 2007 WL 1147291, (Fla. Apr. 19, 2007), and Hall v. State, 614 So. 2d 473, 478 (Fla. 1993), did not involve a victim-eyewitness such as at bar, and involved no request for a jury instruction limiting HAC to the suffering of

the murder victim.

In Hoskins, the defense sought instructions imposing an intent element on HAC in a case that did not involve death by gunshot, so that the requested instructions were not supported by the law. In Hall, the defense simply argued that the instruction given was unconstitutionally vague. Neither case addressed the requirement that HAC be limited to the suffering of the murder victim.

Appellant agrees that under Davis v. State, 698 So. 2d 1182, 1193 (Fla. 1997), "not every court construction of an aggravating factor must be incorporated into the jury instruction defining that aggravator." But that hardly changes the rules that the court has a duty to instruct the jury properly on the law and that it does not have discretion to deny an instruction if (1) there is a reasonable probability that the jury could be mislead, (2) the evidence supports the instruction, (3) the standard instruction does not adequately cover the issue, and (4) the special instruction correctly states the law and is not misleading or confusing. See Stephens v. State, 787 So. 2d 747, 756-57 (Fla. 2001) and Concepcion v. State, 938 So. 2d 559, 561 (Fla. 5th DCA 2006) (judge's discretion is "circumscribed" by Stephens and duty to instruct on law).

AB 69-70 say the jury was instructed that HAC applied to torturous murders of "the murder victim" in that the instruction told the jury that HAC applied to murders "unnecessarily torturous **to the victim**," R4 739, but it ignores the ambiguous difference between "to the murder victim" and "to the victim." In the immediately preceding sentence, the judge told the jury that a "cruel" murder involves indifference to, or enjoyment of, "the suffering **of others,**" and the immediately following sentence told them that HAC applies to murders that show indifference or enjoyment "of the suffering **of another**":

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering **of others.** The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional facts that show that the crime was conscienceless or pitiless and was unnecessarily torturous **to the victim.** Tortuous [sic] murders are those that show extreme and outrageous depravity as exemplified by:
>
> a. The desire to inflict a high degree of pain; or
>
> b. Utter indifference to, or enjoyment of the suffering **of another.**

R4 739. Given such an instruction, jurors would naturally think that the suffering of "the victim" would include the suffering of "others" or "another" including the kidnapping victim, Fizzuoglio, and even Peller's family. They would especially think so in view of the state's exploitation of the "suffering

of another" phrase in final argument, as the state led them down the way pointed out by the instruction.

AB 70 says the proposed instruction had a "potential" to confuse the jury because "HAC can be properly found based on a victim's awareness of a defendant's actions directed toward another." Appellee made no such argument below: it told the judge that HAC had nothing to do with Fizzuoglio: "it has nothing to do with her, it just has to do with the victim, Lance Peller, in this case," SR 64, and it pertained "the victim of the murder, not the victim of the kidnapping." SR 65. If there had been some turn of the phrasing of the instruction to which appellee objected, it had to make that objection clear at the charge conference so that it could be dealt with at that time. Cf. Jackson v. State, 738 So. 2d 382, 386 (Fla. 4th DCA 1999) (objection of lack of foundation must be framed so as to afford the proponent "an opportunity to correct the defects, where possible, by asking additional questions of the witness or calling an additional witness who might be able to correct the defects.").

Regardless, the cases at AB 70 do not affect the case at bar. Hutchinson v. State, 882 So. 2d 943, 958-59 (Fla. 2004), Francis v. State, 808 So. 2d 110, 135 (Fla. 2001), and Henyard v. State, 689 So. 2d 239, 252-53, 254 (Fla. 1996), involved family members who saw other family members being murdered, and

HAC **did focus on the anguish of the murder victims** in witnessing these murders, and not on the anguish of others present. Likewise, the murder victim in Farina v. State, 801 So. 2d 44, 53 (Fla. 2001) witnessed the shooting of her co-workers, heightening her own anticipation of death. Hutchinson and the other cases do not bear on the case at bar, in which there was no such assault on Fizzuoglio, and the proposed instruction told the jury to consider the effect of the murderer's actions on the victim and not their effect on other persons. R4 729.

Stephens does not help appellee. Stephens kidnapped a 3-year-old in a car, and the child was later found dead in the car, having died of asphyxiation or hyperthermia. Stephens sought an instruction on a theory that the child's death occurred independently of the kidnapping. This Court noted that Stephens had taken the language for his proposed instruction from other cases out of context, and that **the cases did not support his claim**. Hence, this Court concluded that his proposed instruction was "confusing and misleading, if not a misstatement of the law altogether." Id. at 787 So. 2d at 757. Appellee has no claim at bar that the law does not support appellant's instruction. It **agreed below** that appellant's instruction correctly stated the law.

Trepal v. State, 621 So. 2d 1361, 1366 (Fla. 1993) also does not help appellee. There, this Court merely held that a judge

is not obligated to give an instruction on circumstantial evidence since the reasonable doubt instruction adequately covers the issue.

5. WHETHER FUNDAMENTAL ERROR OCCURRED IN THE STATE'S JURY ARGUMENT ON HAC.

Appellant agrees with AB 71 that review would normally be barred by counsel's failure to object to the state's argument on HAC. But the answer brief ignores the rule that fundamental error occurs when one cannot tell if a verdict rests on a valid or an invalid theory of law.

AB 72 repeats appellee's reliance on Hutchinson, Francis, Farina, and Henyard. Unlike in those cases, the state told the jury at bar to focus on the suffering and panic of Fizzuoglio, and even Peller's family, as well as on Peller's own suffering.

AB 72 says Peller's mental anguish "was enhanced by Fizzuoglio's presence" as shown by the claimed fact that "Peller begged Defendant to let Fizzuoglio go." But the state's argument to the jury was different: it argued that appellant purposely tortured Peller **and** Fizzuoglio mentally and put them **and** Peller's family through mental anguish. T19 2409-12. The answer brief does not dispute that Clark v. State, 443 So. 2d 973 (Fla. 1983) and Riley v. State, 366 So. 2d 19 (Fla. 1979) bar such argument.

Appellee's argument would eliminate any meaningful limitation on HAC. If one is murdered alone, the state can

claim HAC because of the lonely death in an isolated area, see Parker v. State, 873 So. 2d 270, 287 (Fla. 2004), and, as the state now would have it, it can claim HAC when the victim is not alone because the victim's anguish is "enhanced" by the presence of another.

Although appellee is modest about the effect of its argument, one must assume that the prosecutor calculated that his argument would affect the jury. Although AB 72-73 point to other evidence of aggravation, appellee cannot deny that, even after hearing that evidence, the jury voted only 7-5 for death. The change of a single vote could have affected the outcome.

6. WHETHER THE COURT ERRED IN ALLOWING FIZZUOGLIO'S TESTIMONY THAT PELLER KNEW HE WAS GOING TO DIE.

Appellant agrees that a lay opinion may be admitted where it is otherwise "practically impossible to describe another's appearance." But the cases at AB 74 do not support the speculative testimony at bar. In Zack v. State, 753 So. 2d 9, 23 (Fla. 2000), a witness merely testified to the nature of Zack's relationship with his stepfather based on her observation of that relationship over time. In Branch v. State, 96 Fla. 307, 118 So. 13, 17 (1928), this Court held that a witness could characterize the deceased's gesture as "threatening." In State v. Santiago, 928 So. 2d 480, 481-82 (Fla. 5th DCA 2006), a witness saw Santiago pull out a "shank" and grab the victim, heard the sound of contact, and saw the victim flinch as

Santiago took off running. Based on that testimony, the witness could testify that he chased Santiago because he thought Santiago had stabbed the victim. In Jones v. State, 908 So. 2d 615, 620-22 (Fla. 4th DCA 2005), as discussed in the initial brief, a witness testified about the meaning of words used during prolonged discussions regarding a murder plot. In Shiver v. State, 564 So. 2d 1158, 1159-60 (Fla. 1st DCA 1990), several witnesses testified the defendant was increasingly angry and belligerent in a bar, and thus were able to testify that Shiver seemed to be going to cause trouble and wanted to get revenge from a person who had accused him of abusing his girlfriend.

At bar, Fizzuoglio could and did describe the scene in the apartment without giving her speculative opinion that Peller knew he was going to die. Hence, it was not ""practically impossible" to describe the scene without her speculative testimony.

AB 75-76 say the evidence could not reasonably have affected the jury. But appellee does not explain why it introduced the evidence and relied on it in final argument, T19 2407-08, if not to influence the jury. It does not explain how the 7-5 death verdict could not have been affected by such dramatic evidence and argument based on it.

Instead, it says that, even without the evidence, it could have **argued to the jury** that Peller knew he was going to die

based on other evidence. AB 75-76. But one cannot equate argument inferring a fact with direct evidence of a fact. Juries are instructed (and the jury at bar was repeatedly instructed) on the primacy of evidence over argument.

Further, appellee bases its contention that it could have argued the fact based on a sensationalistic view of the evidence that jurors could easily have rejected. Contrary to appellee's argument, the jury would not likely have agreed that Peller called Pritchard "while cowering in his bathroom," since Pritchard testified that Peller was perfectly calm rather than "cowering" and Pritchard did not know if Peller was in the bathroom. Likewise, jurors could have rejected a claim that Peller "begged Defendant to spare Fizzuoglio," since Fizzuoglio said only that Peller "said" for appellant to let her go because she was not involved. T18 2244.

Appellee cannot deny that it strengthened its case for death as it stretched out the supposed length of time of Peller's anguish. The improper evidence supported its theory in this regard, and it has failed to show that the improper speculative evidence could not reasonably have affected the verdict. Banks v. State, 700 So. 2d 363, 366-67 (Fla. 1997) helps appellee not at all: there, this Court considered the **legal sufficiency** of the evidence supporting HAC in a case of the anal rape of a little girl. It did not involve the question of the prejudicial

effect of the admission of improper speculative evidence.

7. WHETHER HAC WAS USED IN ERROR.

The AB says the judge applied the correct law and his finding was supported by competent substantial evidence. Appellant disagrees. As discussed at length in the initial brief, the judge did not properly apply the law governing HAC in shooting cases, and made findings contrary to the record.

AB 77 cites Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997) and Cave v. State, 727 So. 2d 227, 230 (Fla. 1998) without saying how they could apply at bar. In Willacy, the victim was beaten, strangled, and burned, and in Cave robbers abducted a young woman to a remote location where she was stabbed before being shot. AB 78 likewise cites Hutchinson, Parker, and Lynch v. State, 841 So. 2d 362, 368-39 (Fla. 2003) without saying how they apply at bar. As shown in the initial brief, those cases fall into the category of cases involving extraordinary additional torturous acts such as abduction to a remote area, sexual battery, numerous non-fatal painful wounds, or the witnessing of the murders of family murders or close friends, and hence do not apply here.

AB 79 says that HAC does not require torturous intent under Hoskins v. State, 32 Fla. L. Weekly S159, 2007 WL 1147291 (Fla. Apr. 19, 2007) (defendant raped, beat and strangled victim), Buzia v. State, 926 So. 2d 1203, 1212 (Fla. 2006) (defendant

beat victim and killed him with ax), and Francis (defendant repeatedly stabbed twin sisters). Those cases did not involve shooting deaths, and hence do not bear on the finding of HAC at bar.

At AB 79-80, appellee cites Hutchinson, 882 So. 2d at 958, for the proposition that it need only "present some evidence of either mental or physical torture accompanying the murder for HAC to be properly found in a shooting death." In Hutchinson, the defendant murdered a young boy's family then stalked the boy through the house before murdering him. This Court wrote at pages 958-59 that a shooting death "**can** satisfy this aggravator if the State has presented other evidence to show some physical or mental torture of the victim," but that the analysis must focus on "the circumstances of the murder from the 'unique perspective of the victim.'" The unique perspective of Peller was quite different from that of the child in Hutchinson who saw his family murdered. Further, Hutchinson was addressing a **defense claim** that the **victim** did not have the fear necessary to make the murder HAC, and did not in any way affect the general rule that HAC requires a torturous **intent** for a shooting death.

AB 79-80 say a victim's fear, emotional strain, and terror "may make an otherwise quick death especially heinous, atrocious, or cruel" under James v. State, 695 So. 2d 1229, 1235 (Fla. 1997). This argument ignores the facts of James. James

strangled and anally raped an 8-year-old girl and then tried to rape her grandmother, stabbing her to death. The language quoted by appellee came in the discussion of the application of HAC to the murder of the little girl, in which this Court explicitly relied on the special rule governing murder by **strangulation**.

To distinguish the cases cited in the initial brief, AB 80 says that none of those cases involved a defendant who "announced his intention to kill a victim two hours before the murder, spent the last hour before the murder holding the victim at gun point as the victim hyperventilated, begged the defendant not to kill another person close to the victim and finally called his family to say goodbye." Appellant can hardly dispute that no case involves identical facts to those at bar. Every case is different. Nevertheless, the case at bar does not present more aggravated facts than do cases like Maharaj v. State, 597 So. 2d 786 (Fla. 1992) (Maharaj confronted father and son, shot father in leg, had cohort tie them up, shot father when he lunged at him, began questioning son, shot father as he crawled away, restrained son who broke loose, marched son upstairs and shot him as he faced wall; HAC not applied to father's murder and struck for son's murder), Green v. State, 641 So. 2d 391 (Fla. 1994) (Green accosted man and woman, tied man's hands behind back, fired gun but no one was hit, abducted pair, threatened to kill woman when she tried to escape, man got

gun and fired at him and yelled for woman to escape, she fled, man later found shot dead with hands tied behind back), and Wyatt v. State, 641 So. 2d 355 (Fla. 1994) (escaped convict on murder spree took woman from bar, drove her across state, shot her in head in a ditch "to see her die").

Further, the record does not support the recitation of the evidence at AB 80. First, although Peller told Pritchard that the man had been sent to kill him, he then said the man was not going to kill him and "everything will be alright." T6 703-07. He was not worried about being killed by the man and did not show the intense fear that HAC requires. Second, as already noted, the evidence does not show that appellant held Peller at gunpoint over "the last hour before the murder". Fizzuoglio testified that she was in the apartment for about an hour, T18 2249, but she and appellant spent a considerable amount of that time in the apartment after the shooting. AB 2 and 82 say Webb's 9:00 call came before appellant produced the gun, so that appellant could not have held Peller at gunpoint for more than 15 minutes. Likewise, Fizzuoglio encountered Deputy Bauer at 10:10, almost immediately after leaving the apartment, so that Fizzuoglio's hour in the apartment began within a few minutes of the 9:15 murder. Third, although Peller hyperventilated when the gun was produced (apparently shortly after he snorted cocaine), he calmed down almost immediately. Fourth, Fizzuoglio

did not testify that Peller "begged" for her release, she only testified that he asked for her to be let go because she had nothing to do with the situation. Finally, Peller's call to his father's voice mail just before being shot does not show the degree of torture and fear necessary to make a shooting HAC in view of cases such as Maharaj and Green. Cf. Burns v. State, 609 So. 2d 600 (Fla. 1992) (striking HAC in case in which Burns shot officer who was in watery ditch with hands upraised and telling Burns "You don't have to do this"). HAC does not apply to such a shooting death unless the defendant "intended to cause the victim unnecessary and prolonged suffering." Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995). Compare Diaz v. State, 860 So. 2d 960, 967 (Fla. 2003) (in shooting death, HAC required that"the defendant **intended to cause the victim unnecessary and prolonged suffering**") to Brown v. State, 721 So. 2d 274 (Fla. 1998) (different rule applies to murder by repeated stabbing).

The factual assertions at AB 80 are reiterated at length at AB 81-84, and appellant relies on the discussion in the preceding paragraph to dispose of those reiterated assertions. Appellant does note, however, that AB 82 emphatically claims that Webb's 9 p.m. call came before appellant produced the gun, a claim that disposes of appellee's argument that appellant held Peller at gunpoint for an hour. Further, Henyard and Banks do not support appellee's argument that appellant, who was **banging**

his head against the door in another room, overheard Peller's phone call. In Henyard, the two murder victims were sitting on either side of their mother in a car while Henyard spoke with the mother. Hence, they would have heard what Henyard said in the car's confined interior. Although one cannot make out with certainty appellee's point regarding Banks, it apparently relies on the statement that, after shooting a woman in a trailer, Banks "had to realize that when he shot his wife, her daughter, who also lived in the trailer, would identify him unless he also killed her." Banks was simply making the point that Banks knew the daughter could identify him as the murderer because **she heard the gunshot when Banks shot her mother**. The facts in Banks differ so far from the facts at bar that it does not affect this issue.

AB 84 sets out a perfunctory claim of harmless error, ignoring the fact that the change of a single juror's vote would have altered the outcome. AB 84 argues that no "statutory" mitigator was found, an argument that ignores the constitutional rule forbidding the elevation of "statutory" mitigation over "nonstatutory" mitigation. Cf. Parker v. Dugger, 498 U.S. 308 (1991) (error to affirm death sentence after striking two aggravators on ground that judge found no "statutory" mitigators without consideration of "nonstatutory" mitigators). Further, the distinction between statutory and "nonstatutory" mitigation

disappeared when section 921.141(6)(h) incorporated the "catch-all" mitigator. Juries have recommended life sentences in cases in which there was no "statutory" mitigation, and this Court has reversed death sentences without "statutory" mitigation.

HAC was not harmless beyond a reasonable doubt at bar. The state presented Fizzuoglio's testimony about it, and argued it extensively to the jury, T19 2406-09, 2411-13, and the judge gave it "great weight." R4 781. Although he said he would have given death even without CCP, R4 790, he did not say the same about HAC. The jury voted 7-5 for death. Cf. Harris v. State, 843 So. 2d 856, 869-70 (Fla. 2003):

> The jury recommended death by the narrowest of margins, seven to five. Only one more vote was needed for a life recommendation. The scales might have been tipped in favor of life had the jury not been instructed on the aggravating circumstance of pecuniary gain. Thus, it cannot be said that the jury's consideration of the pecuniary gain aggravator was harmless beyond a reasonable doubt.

8. WHETHER CCP WAS USED IN ERROR.

Most of appellee's argument relies on unproved factual assertions. First, appellant said Mejia wanted to kill Peller for several weeks, but he denied that he entered into the plan and said he went to the apartment to warn Peller, a fact consistent with Peller's telling Pritchard that the man was not going to kill him and appellant's not killing Peller before Fizzuoglio arrived. The state had **no evidence** that appellant **did intend** to kill Peller when he came to the apartment.

Second, Stromoski **did not** say he "observed Defendant with the gun," he only said he believed the murder weapon was the gun in the bag as it looked "familiar," and his description of that gun was vague. Third, Peller did not think appellant was going to kill him, and the state can give no explanation for why, if appellant had come to kill Peller, he spent two hours with him letting him take phone calls and receive a visitor. Fourth, the record does not show an hour-long discussion of killing Peller at the apartment.

AB 88 says that the only evidence that appellant did not intend to kill when he went to the apartment came from appellant's statements and testimony, and that the judge did not have to believe his account. But appellee overlooks that it had no evidence that appellant did intend to kill when he went to Peller's apartment. Thus, Walker v. State, 957 So. 2d 560 (Fla. 2007) does not help appellee. The state presented specific concrete evidence refuting Walker's claim that he became freaked out by threats from the victim: Walker and Ford immediately attacked the victim before the supposed threats, and two women heard Walker asking the victim if he was ready to die, heard the victim begging for his life and screaming in pain, but did not hear him threaten Walker. Id. at 565. But at bar, state's evidence was consistent with appellant **not intending to kill when he arrived at the apartment**. It showed that he arrived two

hours before the murder and did not immediately attack Peller, that Peller did not think he was going to hurt him and did not feel threatened by him, that Peller received phone calls and a visitor while appellant was present, and that appellant killed Peller after taking cocaine, freaking out, and banging his head against the door.

AB 88 also says that Peller's murder was "the sole topic of discussion shortly after Fizzuoglio arrived and continuing until Peller was executed." It points to nothing supporting this claim. Fizzuoglio did not know what appellant and Peller were talking about: after appellant produced the gun, the two men were "just going back and forth," having "like a conversation between two people … and I didn't know what was being said." T13 1666. Then, after he did cocaine, appellant was freaked out and raving.

AB 88 says a victim's state of mind is not normally relevant to a defendant's under Taylor v. State, 855 So. 2d 1, 18 (Fla. 2003). The discussion in Taylor involved statements of the victim indicating that she was willingly accompanying Taylor, and one cannot see how those statements had anything to do with the Taylor's state of mind. At bar, even at AB 88, the very page on which it cited Taylor, the state contended that Peller's murder had been under discussion since the call to Pritchard. That factual claim is refuted by the accounts of Peller's mood

given by Pritchard and Webb, and even by Fizzuoglio's testimony that Peller was unconcerned when she arrived and he and appellant were "just going back and forth," having "like a conversation between two people" after appellant pulled out the gun.

Evans v. State, 800 So. 2d 182 (Fla. 2001) does not help appellee. Evans enlisted Lewis to be the driver in a home invasion robbery in Sanford, but Lewis abandoned the others at the last moment and fled in the getaway car. Evans then went to Orlando and ambushed Lewis, and beat, bound, and gagged him. When police officers arrived, Evans had Lewis taken to another room while the gang dealt with the police. Thereafter, Evans fashioned a silencer, marched Lewis outside, and murdered him. He argued that the murder was not CCP because of mental illness,[5] which this Court rejected. Evans has no relation to the case at bar, in which the state's evidence was that appellant took cocaine, freaked out, raved about people outside, and banged his head on the door before shooting Peller.

We may note here that appellee has made no effort to confront White v. State, 616 So. 2d 21, 22-23 (Fla. 1993). White announced his plan to kill well before the murder, he acquired the murder weapon at a pawn shop, he stalked the victim

[5] Although the judge found that Evans was disturbed at the time of the crime, it was "clear from the trial court's discussion" that he was referring to Evans's history of **prior mental illness**. Id. at 193 (text and footnote 5).

down and shot her, and then calmly left the scene. This Court reversed a finding of CCP because of White's use of cocaine at the time of the murder. See also Almeida v. State, 748 So. 2d 922, 932-33 (Fla. 1999) (striking CCP because of defendant's intoxication and mental illness even though defendant drove to scene, ambushed victim who had expelled him from bar hours before, and drove away). In Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985), the judge erred in relying on the defendant's statement at sentencing, that he was "cold sober" on the night of the murder, in rejecting other evidence showing his intoxication at the time of the murder.[6] In such cases, this Court reversed where the judge seized on one part of the evidence to the exclusion of significant contrary evidence, for a judge must give the evidence not a forced reading, but a fair one. At bar, the evidence showed that appellant took cocaine, freaked out, raved about imaginary people outside, and banged his head on the door before the murder. Under these circumstances, the judge erred in finding CCP.

In view of White, appellant agrees with AB 90 that the totality of the circumstances must be considered. He notes, however, that the cases at AB 90 do not support CCP at bar. The prolonged kidnapping and sexual battery in Wike v. State, 698

[6] Hudson v. State, 538 So. 2d 829, 832 (Fla. 1989) cited Ross as an example of a case in which the defendant committed the murder "in a drunken rage."

So. 2d 817 (Fla. 1997), the long delay between the shots in Lynch v. State, 841 So. 2d 362 (Fla. 2003), in which the defendant killed a mother and her daughter, the deliberate and purposeful actions of the defendants in Rodriguez v. State, 753 So. 2d 29 (Fla. 2000), a triple murder case case, and Occhicone v. State, 570 So. 2d 902, 905 (Fla. 1990), a double homicide in which the defendant broke into his girlfriend's house, left, then returned and murdered her parents and tried to kill her, have no bearing on the facts at bar. None of those cases had eyewitness testimony showing the "freaked out" behavior at bar. In fact, the eyewitness testimony in Wike and Ochicone showed only deliberative action at the time of the murder, and the eyewitness in Rodriguez only said that Rodriguez killed the three victims while he was in an argument, but there was no evidence of the sort of freaked out behavior at bar. Lynch involved no eyewitness evidence and the record did not show the kind of behavior that occurred at bar.

Likewise, the cases at AB 91 do not help appellee. In Lynch, the defendant ambushed and shot his girlfriend, had her daughter open the door, dragged the girlfriend into the apartment where he finished murdering her five minutes later, and then murdered the daughter. In Philmore v. State, 820 So. 2d 919, 934 (Fla. 2002), the men planned to steal a car and murder its driver, then they went out, chose a victim, kidnapped

her, and murdered her. In Looney v. State, 803 So. 2d 656, 678-79 (Fla. 2001), a group of men got into a house by trickery, bound two women, ransacked the house, and decided the kill the women. In Sexton v. State, 775 So. 2d 923, 934-35 (Fla. 2000), Sexton carefully trained his son over several weeks to commit a murder, which refuted the defense theory that Sexton's chronic mental illness "prevented him from planning or orchestrating the murder." In none of these cases did the evidence show that the defendant was intoxicated or banging his head or anything of the like at the time of the murder. These cases involve situations far removed from the facts at bar.

As to prejudice, appellee does not dispute that it argued CCP extensively to the jury. It does not deny that the judge gave it "great weight." R4 783. It does not dispute that the jury recommended death by a 7-5 vote. There is no reason to think that **the jury** found the mitigation "weak." Although appellee points to the judge's statement that he would impose a death sentence even without CCP, it does not explain how this statement in the sentencing order could have diminished the aggravator's effect **on the jury**. Further, it makes no effort to distinguish this Court's determination in Geralds v. State, 674 So. 2d 96, 104, n. 15 (Fla. 1996) that such a declaration by the judge is not dispositive As appellee argues at AB 84 and 93, CCP is a "powerful" aggravator and "among the most weighty." On

this record, one cannot say beyond a reasonable doubt that the error did not affect the result. This Court should order resentencing.

9. WHETHER THE COURT ERRED IN ITS WEIGHING OF SENTENCING CIRCUMSTANCES.

Appellee essentially presents a claim that the trial court acts with unreviewable discretion in weighing sentencing circumstances. Judicial discretion, however, is not so unbounded:

> Judicial discretion has never been confused with the raw power to choose between alternatives, such as to go or not to go. Nor is judicial discretion unreviewable simply because the trial judge chose an alternative that was theoretically available to him.

Thomas v. Thomas, 724 So.2d 1246, 1251 (Fla. 4th DCA 1999) (en banc).

Appellant disagrees with the discussion of the facts at AB 93 regarding appellant's intoxication. The judge wrote, contrary to the record, that the "**only evidence** of drug use" came from Fizzuoglio's testimony about the three lines of cocaine and "[o]ther than that testimony, there is **no indication of additional drug use** by the Defendant." R4 789. Contrary to AB 94, Dilger did not say appellant "was merely drinking" the afternoon of the murder. He said appellant was "pretty wasted," seemed to have been "partying all day," and, in addition to drinking, seemed to be "rolling or [on] Cocaine." T14 1827, 1833. Also, Moreau said that after the murder appellant was

"normal" in the sense that "out of it" was normal to Moreau, T7 961-62, and Fizzuoglio testified that there was cocaine residue on the table when she arrived. T13 1662. A court does not have discretion to ignore such evidence. See Almeida and White. Driving a car or taking other purposeful action does not authorize a judge to ignore or minimize evidence of intoxication. Even highly intoxicated people drive cars and engage in purposeful activity. Further, Fizzuoglio testified to appellant's bizarre behavior immediately before and after the murder, and his driving immediately afterward. T13 1688.

Hence, the cases at AB 95 do not help appellee. In Douglas v. State, 878 So. 2d 1246, 1259 (Fla. 2004), there was no evidence at all of impairment, in Banks, 700 So. 2d at 368, Banks showed "no visible signs of drunkenness," in Johnson v. State, 608 So. 2d 4, 13 (Fla. 1992), "the evidence showed less and less drug influence" over the course of the evening, in Preston v. State, 607 So. 2d 404, 411-12 (Fla. 1992), the evidence did not show any effect of drugs on the defendant's behavior at the time of the crime, and in Bowles v. State, 804 So. 2d 1173, 1181-83 (Fla. 2002), the record did not show how intoxication played into the crime. By contrast, the state's evidence at bar was that appellant took cocaine, freaked out, raved about persons outside, and banged his head on the door immediately before the murder.

Without denying that the judge did not in any way evaluate the testimony of Rabokozy, Gloria Squartino, and Rosemary Hudson as to appellant's long history of drug use, AB 95-96 say the judge considered the evidence by mentioning that "[s]everal witnesses during trial and the penalty phase referred to the Defendant's drug usage." But the judge did not evaluate their testimony, and instead required that the defense show brain damage or evidence that he was under the influence of cocaine at the time of the murder. R4 785-86. The question of whether there are **other mitigators** such as brain damage or intoxication at the time of the crime cannot logically affect the separate question of the weight to give to chronic drug abuse, which can affect one's psychology in a variety of other ways. The judge simply failed to weigh independently the uncontested fact of appellant's chronic drug abuse. Cf. Ross (error not to consider testimony of Ross's family members as to his chronic drinking and other evidence because Ross said at sentencing that he was "cold sober" on night of murder).

Appellee does not deny that the judge did not consider or evaluate the testimony of George Rabakozy, James Hudson, and Det. Butchko about appellant's sexual abuse as a juvenile in giving little weight to that circumstance at R4 787.[7] Instead, it points to the judge's passing reference to "other witnesses"

[7] At R4 787, the judge considered **only** the testimony of the defense expert, and wrote that the expert "had **no corroboration** of the alleged prostitution ring."

when considering the effect of such sexual abuse on the appellant's actions **at the time of the murder** at R4 788-89. But even at R4 788-89 the judge did not evaluate the specific testimony of the witnesses and at neither R4 787 nor at R4 788-89 did the judge assess the effect of such abuse on appellant's overall psychological development.

10. WHETHER THE JUDGE FAILED TO MAKE THE FINDINGS REQUIRED FOR THE DEATH PENALTY.

Appellant relies on the initial brief on this point.

11. WHETHER APPELLANT'S SENTENCE MUST BE REVERSED UNDER RING v. ARIZONA, 536 U.S. 584 (2002) OR FURMAN v. GEORGIA, 408 U.S. 238, 313 (1972).

Appellant relies on the initial brief on this point.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for further proceedings, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief has been furnished to by First-Class U.S. Mail on Sandra Jaggard, Assistant Attorney General, Counsel for Appellee, Suite 950, 444 Brickell Avenue, Miami, Florida 33133 on 11 September 2007.

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Attorney for Russell Hudson

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 12 point Courier, a font that is not spaced proportionately.

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Attorney for Russell Hudson