IN THE SUPREME COURT OF FLORIDA

TAI PHAM,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC08-2355
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
444 Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 252-3367

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

TAI PHAM,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE SC08-2355
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION APPELLANT IS ENTITLED TO A NEW TRIAL BECAUSE OF IMPROPER COMMENTS BY THE PROSECUTOR IN HIS CLOSING ARGUMENTS.

With regard to the first comment by the prosecutor, appellee argues that there was nothing wrong with it because the prosecutor was merely pointing out that when you compare the defendant's version of events with the version presented by other witnesses, his testimony simply made no sense. However, this is not what the prosecutor said. The prosecutor characterized appellant's testimony as "nonsense." And used terms such as

"nonsensical." This is qualitatively different from stating that the defendant's explanation made no sense. The word nonsense carries with it a very demeaning and derogatory connotation. Webster's dictionary defines nonsense as that which is "senseless, foolish, or absurd." It also uses words such as "fatuous" and "anything of trifling importance" in defining nonsense. Certainly people may consider a highly technical document to not make any sense yet would hardly characterize it as nonsense. It is this sort of demeaning characterization of appellant's testimony that is objectionable. Appellee's attempt to downplay the use of the word nonsense must not cause this Court to condone it.

With regard to the comment by the prosecutor regarding appellant's failure to explain some of the evidence, appellee argues that the objection was premature and that when considering the proper context it was not improper at all. However, the trial court recognized that the defendant had no duty to provide any explanation at trial and a comment by the prosecutor suggesting that was indeed improper. While the prosecutor said he was going to "rephrase" his argument, his subsequent argument merely reiterated the improper comment that appellant failed to explain the evidence. Having already denied the motion for mistrial, a further motion was useless. The

argument by the prosecutor was clearly improper.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AND MOTION FOR NEW PENALTY PHASE WHERE THE EVIDENCE REVEALED THAT THERE WAS CLEAR JUROR MISCONDUCT.

Appellee argues that appellant has "overstated the mitigation that was presented." (Brief of Appellee, p. 38) Thus, appellee reasons that the comments by the jurors in apparent "noncompliance" with the trial court's orders had no bearing on the ultimate recommendation that was returned. Appellant obviously disagrees.

Contrary to appellee's assertion, the defense clearly presented a case involving the stark differences between the Vietnamese culture and the American culture. Although both appellant and his wife were born and raised in Vietnam, appellant attempted to maintain the Vietnamese culture in his life while his wife chose the more liberal American lifestyle. This was a constant source of friction in their marriage which manifested itself greatly in the way each parent was attempting to raise the children. Thus, contrary to appellee's assertion, appellant did present a mitigation case that was based on the cultural mores of Vietnamese society. In such a case, the jurors'

comments indicate a very real appeal to a racial bias and a categorical rejection of the mitigation that was being presented. That this rejection occurred before the presentation of the mitigation evidence was completed is clear proof of the jurors' intent to simply disregard it. Appellant is entitled to a new penalty phase.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN TAKING TESTIMONY REGARDING APPELLANT'S PRIOR BATTERY ON A LAW ENFORCEMENT OFFICER CONVICTION AND IN RELYING ON SUCH CONVICTION TO SUPPORT A FINDING OF PRIOR VIOLENT FELONY IN AGGRAVATION.

Appellee's main argument is that this aggravating factor was supported by appellant's contemporaneous conviction for the attempted murder of Christopher Higgins and therefore any reference to the prior conviction for battery on a law enforcement officer was irrelevant. However, this argument misses the point. Appellant did not stipulate to the prior conviction for battery on a law enforcement officer as supporting this aggravating factor. The only way to prove that this was a prior crime of violence is to go beyond the fact of the conviction itself as this Court has noted in ***State v. Kearns***, 961 So.2d 211 (Fla. 2007) when it determined that the crime of battery on a law enforcement officer could be committed by a simple intentional touching of police officer that did not involve use or threat of physical force or violence. While it is true that appellant's contemporaneous conviction for the attempted murder of Christopher Higgins also met the test for the application of this aggravating factor, its

important to note that the very fact that it was a contemporaneous conviction arising out of the same criminal episode is qualitatively different from having prior discrete convictions for unrelated acts of violence. The trial court should not have considered this conviction that had not been presented to a jury.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT APPELLANT'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE FACTS THAT MUST BE FOUND TO IMPOSE IT WERE NOT ALLEGED IN THE CHARGING DOCUMENT NOR WERE THEY UNANIMOUSLY FOUND TO EXIST BEYOND A REASONABLE DOUBT BY A 12-PERSON JURY.

Appellant relies upon the argument on this issue as presented in the initial brief.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A HEINOUS, ATROCIOUS AND CRUEL MANNER.

Appellant relies upon the argument on this issue as presented in the initial brief.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE EIGHTH AND FOURTEENTH TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Appellant relies upon the argument on this issue as presented in the initial brief.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE IMPOSITION OF THE DEATH PENALTY IS PROPORTIONATELY UNWARRANTED IN THIS CASE.

Appellant relies upon the argument on this issue as presented in the initial brief.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those in the Initial Brief, Appellant respectfully requests this Honorable Court to reverse his judgment and sentence and remand the cause for a new trial, a new penalty phase, or in the alternative to reduce the sentence to life.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
444 Sebreeze Blvd. Suite 210
Daytona Beach, FL 32118
(386) 252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to, Tai Pham, #953712, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 22nd day of February, 2010.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

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.

_____
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER