IN THE SUPREME COURT OF FLORIDA

TODD A. ZOMMER,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NUMBER SC08-494
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

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POINT I

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.

Appellee, as did appellant in his initial brief, highlighted the trial court's findings of fact in support of the aggravating circumstances of cold calculated and premeditated. Appellee underlined certain parts of these findings of fact. Curiously, appellee did not underline the most pertinent fact that the trial court found and that was "...the murder was not particularly well planned, ...". (Brief of Appellee, p. 35) This is important because this Court has held that the CCP factor requires proof of "a careful plan or prearranged design." ***Mitchell v. State***, 527 So.2d 129 (Fla. 1988). Very recently in ***Wright v. State***,

2009 WL 2778107 (Fla. September 3, 2009) this Court had the opportunity to discuss the requirements of proof for the element of CCP. Concerning the calculated element of this aggravating factor this Court held:

> The calculated element applies in cases where the defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill.

Wright, Slip Opinion at 40. These factors are completely missing in the instant case. Appellant did not arm himself in advance. Indeed, there is no indication that he had any idea how he might kill the victim. In fact, the evidence shows that appellant repeatedly used items that were obviously insufficient to effect the death of Ms. Robinson. When he finally retrieved the knife, the evidence is that this might have been almost an afterthought. Indeed, appellant went to the kitchen to get a drink and happened to see a block of knives on the counter. Once again it is important to note that no witness could actually quantify the amount of time that this incident took from beginning to end. The best that anyone could do was the medical examiner who testified that it had to take "some time." This is far short of the particularly "lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thoughts by the perpetrator." ***Preston v. State***, 444 So.2d 939, 946 (Fla. 1984). The finding of CCP cannot be sustained.

POINT II

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.

In attempting to justify the finding of heinous atrocious and cruel, appellee several times references appellant's testimony. However, it is important to note that appellant gave many conflicting statements regarding the events that night. Thus, while it is possible to pick and choose from these numerous statements fragments of "facts" to support virtually any argument with regard to this issue, the veracity of such "facts" is questionable at best. For example, appellant testified that when he attempted to strangle the victim with a computer mouse cord, he was unable to because it kept slipping through his sweaty fingers. However, in a previous statement, appellant apparently told someone that he was unable to strangle the victim because she kept putting her hands in the way. The question that arises is which is the truth? The defensive wounds on the back of the hand do not necessarily correspond to the ligature used. There is no evidence that suggests this. Rather, the wounds on the back of the hand could be and most probably were accomplished when the victim tried to prevent being hit with the hurricane lamp. Because all aggravating circumstances must be proved beyond a reasonable doubt, there is no room for speculation. While the evidence clearly supports the conclusion that

appellant intended to kill the victim, there is no evidence that he intended to unnecessarily torture the victim. That appellant chose ineffective weapons to accomplish his task is not indicative of his intent to unnecessarily torture the victim. While appellant recognizes that intent is not necessarily an element for this aggravating factor, ***Ocha v. State***, 826 So.2d 956, 963-64 (Fla 2002), this Court has often noted that the HAC factor applies the murder exhibits "a desire to inflict a high degree of pain, or an utter indifference to more enjoyment of the suffering of another." ***Cheshire v. State***, 568 So.2d 908, 912 (Fla. 1990); ***Santos v. State***, 591 So.2d 160, 163 (Fla. 1991). Once again, it is important to note that there is no time frame that can be firmly established in this case. While obviously it took "some time" to effect the death of Ms. Robinson, we don't know how long it took to render Ms. Robinson unconscious. These factors militate against a finding of HAC.

POINT III

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 TRIAL COURT IMPERMISSIBLY SENTENCED APPELLANT TO DEATH BY MISINTERPRETING THE VALID MITIGATING EVIDENCE AND MISAPPLYING THE LAW WITH REGARD TO THE MITIGATION.

In arguing that the trial court did not err in its consideration of the statutory mitigating factors herein, appellee places much emphasis on the testimony of the state's doctor Tressler. While certainly experts can disagree, there must competent substantial evidence to support one expert over the other. In this particular case, Dr. Tressler by his own admission, lacked important and necessary information to make a complete evaluation. Appellant did not take the tests that Dr. Tressler felt were absolutely critical in making a full evaluation. The reason appellant gave for not taking these tests was that he had already taken the tests. Despite this, Dr. Tressler never indicated he even sought the prior test results. Rather, he chose to make his evaluation based on incomplete data. For example, he testified that when he saw appellant he did indeed exhibits signs of bipolar disease disorder. However, Dr. Tressler simply discounted these findings as being a result of still being under the influence of drugs. Ultimately, Dr. Tressler ruled out bipolar disorder simply because he "could not rule it in." This falls far short of being competent substantial evidence to support the trial court's findings. Additionally, the

evidence that all of the experts considered from appellant's treatment at the children's center when he was a child indicate that appellant indeed suffered from a mental disorder as he was prescribed psychotropic drugs. Even Dr. Tressler admitted that if appellant presented today with the symptoms he did as a child, he would probably be diagnosed as bipolar.

Once again, the trial court chose to reject the evidence of appellant's drug usage based on appellant's statement to the news reporter that drugs played no part in the offense. However, this statement, is clearly refuted by the vast evidence presented by the state. The state's witnesses, the Vellas, testified as to appellant's substantial and constant drug usage leading up to the offense. Immediately prior to the offense, there is evidence that appellant actually used drugs. Even Dr. Tressler testified that he discounted appellant's immediate condition, which he opined was consistent with a bipolar disease, because appellant was still under the influence of drugs several days later. Once again, it is important to note that appellant gave many different statements regarding this offense. To pick and choose among the various statements to support a conclusion falls short of the necessary quantum of proof, competent substantial evidence, that is necessary to sustain a trial court's ruling. The trial court clearly erred in rejecting these mitigating factors.

POINT IV

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 arguments set forth in the Initial Brief.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT ZOMMER'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 recognizes that this Court has rejected the issue herein. However, appellant urges this Court to reconsider and presents the issue in an effort to preserve it for federal review in the likely event that the United States Supreme Court will ultimately rule in his favor.

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 vacate his death sentence and remand the cause with instructions to impose a life sentence without parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Stephen Ake, Assistant Attorney General, 3507 East Frontage Rd. Suite 200, Tampa, FL 33607 and mailed to, Todd Zommer, #343878, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 8th day of September, 2009.

_____
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