IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-976
Lower Tribunal No.: 2006-CF-2999-A-W

RENALDO DEVON McGIRTH
Appellant,

v.

STATE OF FLORIDA
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT
(death penalty case)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES... ii

ARGUMENT IN RESPONSE AND REBUTTAL TO
ARGUMENT PRESENTED IN THE ANSWER BRIEF................. 1

Issue 1: The trial court erred in permitting the prosecutor to argue to the jury that the Defendant was like the September 11, 2001 World Trade Center Terrorists.. 1

Issue 2: The trial court erred by incorrectly answering a jury question about the "conscious intent" jury instruction...................................... 4

Issue 3: The trial court erred in allowing excessive and inflammatory victim-impact evidence... 5

Issue 4: The trial court erred in allowing irrelevant "*Williams*-rule" evidence that had more prejudicial effect than probative value.......... 16

Issue 5: The trial court erred in allowing the "avoid arrest / witness elimination" aggravating circumstance of Fla. Stat. 921.141(5)(c)
(Statement of intent to rely solely on argument in Initial Brief)........... 18

Issue 6: The trial court erred in allowing the "cold calculated and premeditated" ("CCP") aggravating circumstances
(Statement of intent to rely solely on argument in Initial Brief)........... 18

Issue 7: The trial court erred in allowing the "especially heinous, atrocious and cruel" ("EHAC") aggravating circumstance.................. 18

Issue 8: (statement that this issue has been withdrawn)........................ 19

Issue 9: The Defendant's sentence of death cannot stand because Florida's death-sentencing scheme violates the rules of *Ring v. Arizona* and *State v. Steele*
(Statement of intent to rely solely on argument in Initial Brief)........... 19

CERTIFICATE OF SERVICE.. 21

CERTIFICATE OF COMPLIANCE.. 22

TABLE OF AUTHORITIES

CASES

Booth v. Maryland
482 U.S. 496 (1987)... 14

Caldwell v. Mississippi
472 U.S. 320 (1988).. 1

California v. Ramos
463 U.S. 992 (1983)... 1

Carranza v. State
985 So.2d 1199 (Fla. 4th DCA 2008)... 4, 6, 7

Chandler v. State
702 So.2d 186 (Fla. 1997).. 11

Darden v. Wainwright
477 U.S. 168 (1986)... 11

Eddings v. Oklahoma
455 U.S. 104 (1982)... 2

Floyd v. State
850 So.2d 383 (Fla. 2002).. 13

Gardner v. Florida
430 U.S. 349 (1977)... 2

Hess v. State
794 So.2d 1249 (Fla. 2001)... 3

Lockett v. Ohio
438 U.S. 586 (1978)... 2

Norton v. State
709 So.2d 87 (Fla. 1997).. 10

Pait v. State
112 So.2d 380 (Fla. 1959)... 2

Payne v. Tennessee
501 U.S. 808 (1991)... 10, 11, 13, 14, 15, 16

Paramore v. State
229 So.2d 855 (Fla. 1969).. 2

Ring v. Arizona
536 U.S. 584 (2002)... 19

Smith v. State
866 So.2d 688 (Fla. 1993).. 17

Spencer v. State
615 So.2d 688 (Fla. 1993).. 12, 13

State v. Steele
SC04-802 (Fla. Sct. October 12, 2005).................................... 19

Teffeteller v. State
439 So.2d 840 (Fla. 1983).. 3

Wheeler v. State
4 So.3rd 599 (Fla. 2009).. 11, 14

Williams v. State
110 So.2d 654 (Fla. 1959).. 16, 17

Windom v. State
656 So.2d 432 (Fla. 1995).. 10, 13, 16

Woodson v. North Carolina
428 U.S. 280 (1976)... 2

STATUTES

Fla. Stat. Section 921.141 (2)(a).. 9

Fla. Stat. Section 921.141 (5)(c).. 18

Fla. Stat. Section 921.141 (7)... 13

CONSTITUTIONS

Amend. 14, U.S. Const.. 11, 14

PRELIMINARY STATEMENT

Appellant here uses the same, abbreviated method of referring to the record on appeal that he used in his Initial Brief. Likewise, Appellant continues to refer

to himself as both "Appellant" and "Defendant" in this Reply Brief.

ARGUMENT IN RESPONSE AND REBUTTAL TO ARGUMENT PRESENTED IN THE ANSWER BRIEF

Issue 1: The trial court erred in permitting the prosecutor to argue to the jury that the Defendant was like the September 11, 2001 World Trade Center Terrorists

Appellee correctly points out, at page 44 of its Answer Brief, that the offending prosecutorial remark equating the Defendant with the September 11th terrorists was made at the end of the *sentencing* phase of Defendant's trial. The fact that this remark occurred later on, during the critical, life-versus-death portion of the trial made it all the more damaging. With regard to the greater potential damage and the greater judicial scrutiny of improper prosecutorial remarks made during the penalty phase of a capital case, the United States Supreme Court stated, in Caldwell v. Mississippi, 472 U.S. 320 (1988)

> This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S., at 998-999. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. See, e. g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion); Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976).

Hence, the fact that the offending comment was made during the penalty phase of the present Appellant's trial does not weaken Appellant's argument on this issue; It strengthens it.

Appellee argues, at pages 44 and 46 of its Answer Brief, that the reviewing

courts apply a harmless error analysis coupled with abuse-of-discretion standard when reviewing trial court rulings concerning inflammatory prosecutorial remarks. However, the Florida Supreme Court goes a bit farther in death penalty cases:

> Comments of counsel during the course of a trial are controllable in the discretion of the trial court, and an appellate court will not overturn the exercise of such discretion unless a clear abuse has been made to appear. Paramore v. State, 229 So.2d 855 (Fla. 1969), vacated, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972). While "[i]t is extremely difficult to definitely state at what point the line should be drawn between what is doubtfully permissible argument and what is clearly wrong," 229 So.2d at 860, in the instant case the line was clearly drawn too far. "We think that in a case of this kind the only safe rule appears to be that *unless this court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the . . . [sentence] must be reversed."* Pait v. State, 112 So.2d 380, 385-86 (Fla. 1959). We cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase. We hold that it was reversible error for the trial court to deny appellant's motion for a mistrial or for a cautionary instruction.
>
> Teffeteller v. State, 439 So.2d 840, 843 (Fla. 1983) (emphasis Appellant's)

Appellee argues, at page 47 of its Answer Brief, that likening the Appellant to the September 11th terrorists was an "analogy to Sheila Miller's culpability *vis a vis* (Appellant) McGirth." However, entitling such comments "analogies" or "comparisons" does not eliminate the problem. In Hess v. State, 794 So.2d 1249 (Fla. 2001) this Florida Supreme Court addressed the question of whether it was

appropriate for *defense counsel* to make sentencing-phase arguments which compared the accused to much worse mass murderers like Ted Bundy, Jeffrey Dahmer and Charles Manson. The Court held that comparisons with murderers in other cases is inappropriate because the jurors making a sentencing decision in the present present case are unaware of all of the facts ("variables") in the other cases:

> We have previously held that evidence concerning sentences imposed upon *codefendants* must be admitted in the penalty phase in order to allow the jury to know all the facts and circumstances surrounding an offense and its participants. These cases do not hold, however, that the circumstances and sentences in other death penalty cases must be admitted in the sentencing phase of the trial. Evaluating the sentences of other defendants in unrelated crimes involves a number of variables.
>
> (p. 1269)

If the defense is prohibited from making analogies to *distinguish* the Defendant from mass murderers, then certainly the prosecution is prohibited from making analogies to *equate* the Defendant with mass murderers.

Finally, the Appellant respectfully disagrees with the statement, appearing at page 47 of Appellee's Answer Brief, that the error was harmless. The Appellant was barely and adult at the time of the subject offenses. He was 18 years, 3 months old. R1, p. 1-4. His jury did not recommend the death penalty unanimously. On the contrary, one juror voted to spare his life. R47, p. 3525. Given Appellant's youth and immaturity, there is reason to believe that, but for

the improper, inflammatory remark equating the Appellant with the September 11th terrorists, Appellant would have received the five additional "life" votes he needed for a sentence of life in prison without the possibility of parole.

Issue 2: The trial court erred by incorrectly answering a jury question about the "conscious intent" element of the "principals" jury instruction

Appellee cites Carranza v. State, 985 So.2d 1199, 1202 (Fla. 4th DCA 2008) for the proposition that the trial court *correctly* answered the jury's question about whether the "conscious intent" needed to find the Appellant guilty as a "principal" to a crime –that is, as one who *participated* in *any* crime– is the same as the "premeditated intent" needed to find the Appellant guilty of premeditated, first-degree murder.

The question in this appeal, restated in slightly clearer terms, is whether the trial judge may, *in response to a jury question of whether the "conscious intent" needed for "principal" guilt is the same as the "intent" needed for premeditated, first-degree murder*, *answer*:

> Ladies and gentlemen, the question I have, jury question No. 4: Is conscious intent the same as premeditation in that it can occur a few seconds before the crime was committed? Specifically, is conscious intent the same as premeditation? The answer is no. The law does not fix the exact amount of time that must pass for the formation of conscious intent.
>
> (R45, p. 3168)

By responding in this fashion, Appellant's trial judge indicated, at first, that

the “conscious intent” needed for principle culpability is *not* the same as the “premeditated intent” needed for first-degree murder. But then, in the next breath, he defined the “conscious intent” element of “principal” jury instruction in the same terms used to define “premeditated intent” in the standard, premeditated, first-degree murder jury instruction. In other words, the trial judge effectively informed the jurors that, although these intent types are separate legal concepts, functionally they are the same.

The Carranza court did not hold that the “intent” element of first-degree murder is the same is the same as the “intent” element of “principal” liability. On the contrary, the Carranza court made it clear that they are two very different types of intent. With regard to the intent required to find a defendant guilty as a “principal” to a murder, the Carranza court explained:

> "In order to be convicted as principal for a crime physically committed by another, the defendant must intend that the crime be committed and must do some act to assist the other person in actually committing the crime."
>
> * * *
>
> Carranza was a principal to the murder. Sandoval asked Carranza if he were up for a 187, or murder, to which Carranza replied in the affirmative. Thus, it is clear that Sandoval expressed a conscious purpose to kill to which a trier of fact could find that Carranza assented. When Sandoval came out of the bedroom and said, "I did it," and Carranza went into the bedroom, Sandoval urged him to "finish it." Carranza responded by choking her with sufficient strength to cut off her breathing. He choked her for several seconds to several minutes. Bataille died of

> manual strangulation. Carranza expressed his intent to participate in murder and by choking Bataille did an act to assist Sandoval in committing the crime. This evidence was sufficient to show a conscious intent to participate in the murder, . . .
>
> (Id., p. 1202)

Although the Carranza court indicated that this same, single set of facts in Carranza satisfied both the "premeditated intent to kill" element of first-degree murder and the crime-participation intent of "principal" criminal liability, the Carranza court emphasized that the "premeditated intent" of first-degree murder is different from "principal" crime-participation intent as follows:

> Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as the nature of the act to be committed and the probable result of that act.
>
> (Id., 1212)

Appellant also disputes the claim, appearing at page 48 of Appellee's Answer Brief, that "the evidence demonstrates that McGirth was the individual who . . . ultimately executed Ms. Miller with a gunshot to the head." Appellee does not refer to any trial testimony in support of this proposition. Rather, Appellee refers to the *summation* of evidence contained in the trial judge's Sentencing Order (R9, p. 1523-24) and to the jury's, first-degree murder "guilty"

verdict. (R45, p. 3170-3171).

As indicated in pages 32-33 of Appellant's Initial Brief, of the three shots fired, the only shot visually observed by any trial witness was the first one. [1] That was the first, non-fatal shot to Mrs. Miller's chest. Mrs. Miller's daughter, Sheila Miller, testified that Appellant fired it when Mrs. Miller raised her hands and moved toward Appellant. Appellant's Initial Brief, p. 32; R35, p. 1749-1755. Assuming that this is true, the shooting appears to be a reaction to Mrs. Miller's perceived resistance. In other words, the first, non-fatal bullet to Mrs. Miler's chest looks like what is commonly referred to as a "robbery gone wrong" shooting.

If such first shot *had* been fatal (It wasn't: R39, p. 2370-2374; R 46, p. 2325, 3235) the State would almost certainly characterize Mrs. Miller's death as "felony" murder. Although every firearm murder is tragic and deserving of punishment, it is reasonable to expect the typical juror to regard a reflecting, "premeditating" shooter as substantially more evil than the "panic" shooter of the common, "robbery-gone-wrong" scenario.

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[1]There is, arguably, *circumstantial* evidence which suggests that the present Appellant was the shooter of the third, fatal bullet to the back of Mrs. Miller's head. *See* Appellant's Initial Brief, p. 33. However, no testifying witness viewed that shooting. Beyond what the Medical Examiner said about that third bullet being shot to the back of Mrs. Miller's head from a gun a foot or more away from the back of her head (R40, p. 2363-2376), there was no testimony about what, if anything, transpired between the shooter and Mrs. Miller in the moments before

As noted at pages 32-33 of Appellant's Initial Brief, there were no eyewitnesses to the third shot. That was the sole, fatal shot.

By hybridizing the premeditated, first-degree murder instruction with the "principal" jury instruction, Defendant's trial judge blurred the distinction between the "premeditated intent" needed for premeditated, first-degree murder and the "principal" intent needed for "principal" liability *for assisting any codefendant in any crime.* This blurring likely caused Defendant's jurors to mistakenly believe that the "intent " needed for "principal" liability for *any* crime also satisfied the "premeditated intent to kill" element of first-degree murder, or vice-versa. The fact that Defendant's jurors asked the judge the question about the two types of intent (R45, p. 3154) indicates that the jurors were confused.

Florida law requires that jurors "weigh" aggravating circumstances before making their life-or-death recommendation. Fla. Stat. Section 921.141 (2)(a). In capital cases like this one, jurors *do* need to "sweat the small stuff." They must remain sensitive and attuned to the small distinctions that indicate differing degrees of evil or dangerousness.

Judges and juries commonly regard the "trigger man" of a shooting crime as substantially more evil and dangerous than his non-shooting cohorts. In the present case, this distinction was minimized when Appellant's trial judge blended

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the fatal, third shot was fired.

the legal definitions of the "intent" needed for premeditated, first-degree murder with the "intent" needed for mere "principal" liability for *any* crime.

For all of these reasons, Appellant disagrees with Appellee's assertion that the questioned jury instruction was "not erroneous beyond a reasonable doubt." The trial judge's response to the jury question about the two types of intent was *confusing* beyond a reasonable doubt. That is why both the State and the defense objected and moved for mistrial in connection with the judge's answered to the jury question.

Issue 3: The trial court erred in allowing excessive and inflammatory victim-impact evidence

At pages 51 and 52 of its Answer Brief, Appellant cites Payne v. Tennessee, 501 U.S. 808 (1991) and Windom v. State 656 So.2d 432, 438 (Fla. 1995) in support of its argument that there was no error nor other basis for reversal in the complained-of victim-impact evidence. However, in Windom, the Florida Supreme Court made it clear that improper victim-impact evidence *is* reviewable without objection if it rises to the level of fundamental error. The Windom court explained, "The failure to contemporaneously object to a comment on the basis that it constitutes improper victim testimony renders the claim procedurally barred absent fundamental error. See, e.g., Norton v. State, 709 So.2d 87, 94 (Fla. 1997); *see also* Chandler v. State, 702 So.2d 186, 191 (Fla. 1997)."

Payne v. Tennessee, 501 U.S. 808 (1991), is, of course, the seminal case

allowing victim-impact evidence. In Payne, however, the United States Supreme Court made it clear that there are limits to victim-impact evidence as follows:

> In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See Darden v. Wainwright, 477 U.S. 168, 179-183 (1986).
>
> (Id., p. 825)

At page 51 of its Answer Brief, Appellee argues that "None of the (victim-impact) evidence was improper, and none of it was contrary to the restrictions placed on victim impact testimony." This Florida Supreme Court has hinted that prosecutors have been nearing the limit of allowable victim-impact evidence. In Wheeler v. State, 4 So.3d 599 (Fla. 2009), the prosecution presented 54 victim and family "photo montages." This Florida Supreme Court said:

> Potentially more problematic is the State's presentation of photographic montages depicting Deputy Koester in various settings in the community and with his family. The State presented fifty-four victim and family photographs mounted on four poster boards showing the victim in different settings such as with family members, holding babies, serving in the National Guard, and coaching. There is nothing in our case law or the victim impact statute that prevents the State from presenting photographs as part of its victim impact evidence and, as with victim impact evidence from witnesses, we have never drawn a bright line as to the number of permissible photographs that the State may present. In this case we conclude that neither fundamental error nor a due process violation has been demonstrated in this case by the number of photographs alone,

where Wheeler has not identified any particular photograph or group of photographs that was impermissibly prejudicial so as to render the penalty phase fundamentally unfair.

We do note that the trial judge was clearly concerned with the State's victim impact evidence, advising the prosecutor:

> My preference would be that you offer this evidence at a Spencer hearing as opposed to in front of this jury, should we get that far. I believe that to offer it here today creates an opportunity, a significant opportunity, for error.
>
> I have spent a lot of time yesterday reading the statements from the various family members. I have spent a lot of time reading the statute. I have spent a lot of time reading every case that I could find. And my view of all the various things that I have read strikes me that this particular area would be — statements are a mine field waiting to create potentially some error that we don't have now.
>
> My opinion with respect to testimony regarding Mr. Koester's uniqueness and the resulting loss to the community, coupled with my obligation to make sure that the probative value is not outweighed by the prejudicial effect, makes it doubly a matter in my view of much subjectivity. My opinion — you know I think that everybody could agree on what's on the fringes. But I think when you get to topics that fall in the center, that reasonable people could disagree. And I just think it's an area that could create error in this case where, in my view, no significant error exists, if any.
>
> However, you have the right to present that if that's what you want to do. That's your — I mean, you have the opportunity. I have the obligation to let you do that.

> Despite these reservations, the trial court properly overruled the general objection to victim impact evidence because we have repeatedly held that the United States Supreme Court, as well as our state statute, allows its introduction within limits. See, e.g., Floyd v. State, 850 So.2d 383, 407 (Fla. 2002) (declining invitation to recede from Windom, reiterating that the statutory procedure for addressing victim impact evidence does not impermissibly affect the weighing of aggravators and mitigators, and rejecting argument that victim impact evidence should be limited to a Spencer hearing); § 921.141(7), Fla. Stat. (2006). In this case, the trial court accommodated every specific objection to victim impact evidence that was voiced by defense counsel. Because Wheeler has identified no reversible error committed by the trial court in admission of the victim impact evidence, we deny relief on this claim.
>
> Although, for the reasons set forth, we do not reverse based on the number of victim impact photographs presented in this case, we nevertheless caution prosecutors to be ever mindful of the limited purpose for which victim impact evidence may be introduced. Prosecutors should make every effort to ensure that the rights of victims and families, who naturally want their loved one to be remembered through testimony and pictures, do not interfere with the right of the defendant to a fair trial. We also remind prosecutors of the admonition in Payne that when presentation of victim impact evidence "is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825, 111 S.Ct. 2597. We encourage trial judges to assist in ensuring that the proper balance is struck.

[Wheeler v. State, 4 So.3d 599, 608-610 (Fla. 2009)]

In Payne v. Tennessee, 501 U.S. 808 (1991) the United States Supreme Court adopted Justice White's dissent in Booth v. Maryland, 482 U.S. 496 (1987), as its new (current) rule allowing victim-impact testimony. In doing this, the

United States Supreme Court made it clear that victim-impact evidence is limited to the *loss* to society, and particularly to the victim's family, as follows:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique *loss* to society and in particular to his family." Booth, 482 U.S., at 517 (WHITE, J., dissenting) (citation omitted).
>
> (Payne, supra, p. 825; Emphasis Appellant's)

With regard to *memorial* evidence, the present case is one of first impression. Appellant has been unable to find any Florida cases on the subject. However, the answer to the question of whether memorials are allowable, victim-impact evidence is in Payne. The only victim-impact evidence allowed by Payne is societal *loss* evidence.

The State presented an overabundance of memorial-type victim-impact evidence in the present case. State witness Lee Hancock testified about the 25-person memorial gathering and the $500 memorial ad that was shown to the jury and the memorial contribution to the Alzheimers Fund. R46, p. 3227-3228. He also described how the baseball team "retired" the victim's baseball jersey and placed that retired baseball jersey and Mrs. Miller's photograph and sports medals

in a memorial "shadow box" that was shown to Appellant's jury. R46, p. 3228-3230. He testified about the memorial prayer and balloon-release (R34, p. 3230-3231).

Such "memorial" evidence does not demonstrate how any one, particular member of society has personally suffered as a result of the victim's death. Although memorials express honor and respect for the dead, they do not speak to the personal-loss issue enunciated in Payne.

The quantity of inflammatory, *memorial* evidence presented to Appellant Renaldo McGirth's jurors was overwhelming. It likely resulted in them giving short shrift to the aggravation and mitigation weighing process. It likely incited them to sentence the Defendant straightaway to death. Thus, Appellant *disagrees* with the statement, appearing at pages 51-52 of Appellee's Answer Brief, that " . . . there is no legal error, and , consequently, no legal basis for reversal. Payne v. Tennessee, 501 U.S. 808 (1991); Windom v. State, 656 So.2d 431, 438 (Fla. 1995)."

At the very least, the trial court judge's act of passively allowing all the memorial evidence was fundamental error. Appellant urges this Florida Supreme Court to review it without requiring more specific objections by the defense.

Unless this court prohibits memorial evidence, there will be no end to it. It

is easy to foresee prosecutors showing jurors photographs of open-casket funerals and transporting jurors to cemeteries to view headstones and graves.

<u>Issue 4: The trial court erred in allowing irrelevant "*Williams*-Rule" evidence that had more prejudicial effect than probative value</u>

Appellee states, at page 51 if its Answer Brief, that the *Williams*-rule testimony of other bad acts of the Appellant (in this case , evidence of Appellant's involvement in illegal drug activities) was elicited by co-defense counsel, not the state.[2] This is true for all of Sheila Miller's complained-of *Williams*-rule testimony.[3] However, the trial court denied Appellant's motion to prohibit such *Williams*-rule testimony at a pre-trial motion hearing conducted earlier, on January 18, 2008 (R23, p. 3, 48, 51-54). Therefore, it would have been futile for Appellant to object to such testimony later on, regardless of which lawyer happened to be eliciting it.

Appellee cites <u>Smith v. State</u>, 866 So.2d 688 (Fla. 1993) for the proposition

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[2]This is the undersigned attorney's first appeal from the Florida Fifth Judicial Circuit. The undersigned was unfamiliar with the transcript title and caption formats used in the Fifth Judicial Circuit. This resulted in erroneously attributing some witness-examination questions to the wrong lawyer. The undersigned remain on the lookout for such errors and will alert court and counsel if any that are found.

[3]The first seven lines of page 53 of Appellant's Initial Brief require correction. As Appellee points out, Sheila Miller's complained-of testimony was elicited by codefendant's attorney, not the prosecutor. Such witness questioning appears at R41, p. 2679-2681, not at the pages indicated at the top of page 53.

that the other, non-charged, drug-related crimes were an "integral part" of the subject crimes. (Appellee' Answer Brief, p. 53). This is not supported by the record. On the contrary, as indicated in the Statement of the Case and Facts appearing at pages 1- 38 of Appellant's Initial Brief, the record clearly indicates that the assailants came to the Millers' house for one reason only: to rob them. None of the Defendants were charged with or convicted of any drug-related offenses. R1, p. 1-4. At the very least, the testimony about illegal drug activity acted as a nonstatutory aggravating circumstance, worsening the Defendant in the eyes of the jury.

Issue 5: The trial court erred in allowing the "avoid arrest / witness elimination" aggravating circumstance of Fla. Stat. 921.141(5)(e)

The Appellant stands on the argument he has already submitted on this issue.

Issue 6: The trial court erred in allowing the "cold calculated and premeditated" ("CCP") aggravating circumstance

The Appellant stands on the argument he has already submitted on this issue

Issue 7: The trial court erred in allowing the "especially heinous, atrocious and cruel" ("EHAC") aggravating circumstance

At page 67 of its Answer Brief, Appellee argues that this is a case in which the victim was terrorized before being murdered. The State also argues that mere indifference to the victim's suffering is enough for the EHAC aggravating

circumstance.

As Appellant pointed out in page 12 of his Initial Brief, the first shot, the one to Mrs. Miller's chest, occurred after Mrs. Miller raised her hands and rose to go to the bedroom door where Defendant was standing. R 35, p. 1754-1755. As such, the first bullet appears to have been shot in response to Mrs. Miller's resistance, not for purposes of inflicting suffering. Furthermore, the human chest, with its heart and lungs and other vital organs, is the least likely target of a shooter who desires or is indifferent to suffering. Also, as Appellant pointed out in pages 32 through 33 of his Initial Brief, there were no eyewitnesses to the third shot. There was insufficient evidence for the jury to find that the shooter intended or was indifferent to Mrs. Miller's suffering.

Issue 8: Withdrawn

Issue 9: The Defendant's sentence of death cannot stand because Florida's death-sentencing statutes violates the rules of *Ring v. Arizona* and *State v. Steele*

The Appellant stands on the argument he has already submitted on this issue and any other issues not otherwise addressed above.

(continued on next page)

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(continued on next page)

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