IN THE SUPREME COURT OF FLORIDA

JUSTIN HEYNE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC09-2323
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444Seabreeze Blvd. Suite 210
Daytona Beach, Florida 32118
(386) 252-3367

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

The original record on appeal is comprised of twenty-five consecutively numbered volumes. The pages of the first nine volumes are numbered consecutively from 1 to 1388. Volume ten begins renumbering the pages sequentially from page 1 to 3020 which concludes volume twenty-five. Pages 1 through 800 are also known as supplement volume II through V.[1] Counsel will refer to the record on appeal using the appropriate Roman numeral to designate the volume number followed the appropriate Arabic number referring to the appropriate page. There is a one volume supplement and counsel shall designate the supplement with the letter "S" followed by the appropriate Arabic number referring to the appropriate page.

[1] The Court Reporter had improperly compiled the initial record.

STATEMENT OF THE CASE

Justin C. Heyne, hereinafter referred to as appellant, was indicted by a Grand Jury with three counts of First Degree Premeditated Murder. (IV 450) The state filed a Notice of Intent to Seek the Death Penalty. (IV 469) The trial court issued an Order Appointing Experts for Competency Evaluation. (IV495) The trial court found that the appellant was competent to proceed based upon the reports of the doctors. (IV 500) The appellant filed several motions challenging the constitutionality of the Florida death penalty scheme.[2] The trial court denied the motions.[3]

The state rests. (XIX 1995) The appellant moved for a judgment of acquittal on all three counts. (XX 2018) On count I (premeditated murder of Benjamin Hamilton) the appellant argued that he was confronted by the use of deadly force

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[2] Section 921.141(5)(e) (Avoid Arrest) (IV 501); Section 921.141(5)(h) (EHAC) (IV 541); Section 921.141(5)(d) (Felony Murder) (IV 572) Section 921.141(5)(b) (Prior Violent Felony) (IV 578); Section 921.141(5)(I) (CCP) (V 601); Section 921.141 (Faulty Appellate Review) (V 658); Section 921.141(2)&(3) (Mitigation must outweigh Aggravation) (V 690); Section 921.141(1) (Hearsay Evidence) (V 741); Section 921.141(7) (Victim Impact) (V 746); Florida Capital Sentencing Procedure violates ***Ring v. Arizona*** (VI 796)

[3] Victim Impact (VI 835); Faulty Appellate Review (VI 837); Florida Capital Sentencing Procedure violates ***Ring v. Arizona*** (VI 841); Mitigation must outweigh Aggravation (VI 846); Section 921.141(1) (VI 847); Section 921.141(5)(I) (VI 848); Section 921.141(5)(e) (VI 849); Section 921.141(5)(h) (VI 850); Section 921.141(5)(b) (VI 851); Section 921.141(5)(d) (VI 852).

by Hamilton and justifiably used deadly force to defend himself. (XX 2019) Appellant also argued that the shooting of Sarah Hamilton was in self- defense (Count II). (XX 2023) The appellant argued that Sarah Bukowski was going to her side of the bed and kneeled down where a known weapon was located and when she came back up she was shot. (XX 2023) These facts would support a reasonable hypothesis that he had proper use of deadly force. (XX 2024) The appellant further argued that on count I and II a judgement of acquittal should be granted or the cases reduced to second degree murder or manslaughter based on ***Fennel v. State***, 959 So.2d 810 (Fla. 4th DCA 2007) because the state failed to prove premeditation. (XX 2028,29) The appellant also cited ***Green v. State***, 715 So.2d 940 (Fla. 1998) (Lack of preconceived plan). (XX 2030) The appellant moved for a judgment of acquittal as to count III (murder of Ivory Hamilton) on the grounds that it was an accident and therefore excusable homicide. (XX 2027) The trial court denied the Motions for Judgment of Acquittal. (XX 2052)

The appellant rests. (XX 2092) The appellant renewed his Motion for Judgment of Acquittal as to Counts I, II and III. (XX 2094) The trial court denied the renewed Motions for Judgment of Acquittal. (XX 2094)

The appellant had a prior violent felony conviction of robbery with a weapon. (XXI 2374) Two victim impact statements were read into the record over

appellant's objection. (XXI 2392) The state rest in the penalty phase. (XXI 2393)

The appellant renewed his motion for judgment of acquittal and directed verdict as to Heinous, Atrocious and Cruel (EHAC) aggravating circumstance concerning the murder of Ivory Hamilton. (XXI 2393) The appellant cited ***Rimmer v. State***, 825 So.2d 304 (Fla. 2002), ***Diaz v. State***, 860 So.2d 960 (Fla. 2003), and ***Hutchinson v. State,*** 882 So.2d 943 (Fla. 2004). (XXI 2395) The trial court denied the appellant's motion to exclude the EHAC aggravating factor. (XXI 2395) The appellant renewed his motion for judgment of acquittal in respect to the EHAC aggravator for victim Ivory Hamilton. (XXIV 2905) The appellant argued there was no evidence presented of additional acts which demonstrate the murder of Ivory Hamilton was intended to be unnecessarily torturous, and there was no evidence that there was unnecessary pain. (XXIV 2905) The trial court denied the motion for judgment of acquittal. (XXIV 2906) The jury returned an advisory sentence of life as to Count I; the jury returned an advisory sentence of death by a vote of 8 to 4 as to Count II; and the jury returned an advisory sentence of death by a vote of 10-2 as to Count III. (XXV 3017)

The trial court issued a Sentencing Order and found that there was one aggravating factor applied to the murder of Sarah Bukowski and gave it great

weight.[4] (VIII 1125) The trial court found that there were three aggravating factors as to the murder of Ivory Hamilton and gave them great weight.[5] (VIII 1225-27) The trial court found that appellant suffers from mental illness; has brain damage and brain deficits, and has a problem with the abuse of cocaine and alcohol. (VIII 1227-28) These three items combined supported the finding of the statutory mitigating factor that the appellant lacked the capacity to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of law was substantially impaired during the murders. (VIII 1229) The trial court found some non-statutory mitigating factors and gave them moderate and little weight. (VIII 1227-32)

The trial court followed the jury recommendation as to Count I and sentenced the appellant to life; the trial court overrode the jury advisory sentence as to Count II, finding that the mitigation outweighed the aggravation and sentenced appellant to life; and as to Count III the trial court found that the aggravating factors outweighed the mitigation and sentenced the appellant to death. (VIII 1234) The appellant filed a timely Notice of Appeal. (VIII 1209) The state

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[4] The defendant has been previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

[5] The defendant has been previously convicted of another capital felony or a felony involving the use or threat of violence to the person; the capital felony was

also filed a timely Notice of Cross-Appeal. (VIII 1245). This appeal follows.

STATEMENT OF THE FACTS

On March 29, 2006 Ivory Hamilton was involved in an accident at school and her front baby teeth were injured. (XVII 1520) On March 30, 2006 Sarah Bukowski and Ivory Hamilton's grandmother, Deborah Reed, took Ivory to the dentist and the injured teeth were removed. (XVII 1521) Ms. Reed dropped Sarah Bukowski and Ivory off at their house that afternoon at 2:30 pm. (XVII 1525)

Benjamin Hamilton, Sarah Bukowski, Ivory Hamilton and the appellant resided together in a single family house located on Moon Road in Titusville, Florida. (XVII 1535) Their next door neighbor was Yvette Bernard. (XVII 1535) On the afternoon of March 30, 2006 Bernard went to their next door neighbor's house and found that the front door was ajar. (XVII 1537) Bernard then heard Sarah Bukowski hollering "somebody please help me, somebody please help me." (XVII 1537) Bernard ran to the back bedroom and she saw Benjamin Hamilton lying on his back on the bed and he was struggling to breath. (XVII 1538) Then Bernard noticed Sarah on the floor beneath the bed. (XVII 1539) Sarah was in the fetal position and her face down underneath the bed frame and she was just screaming for help. (XVII 1539) Bernard told Sarah that she was going to get help

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especially heinous, atrocious and cruel; and the victim

and then noticed the lifeless body of Ivory Hamilton lying in a fetal position nearby. (XVII 1540) Bernard also noticed a handgun on the floor near the entrance to the bedroom. (XVII 1540)

Officer Brian Roy of the Titusville Police Department was the first officer to respond to the scene. (XVII 1556) Officer Roy retrieved a small black and gray semi automatic pistol from the victim's bedroom. (XVII 1560) Officer Roy also retrieved a handgun on the sofa in the living room. (XVII 1561) Officer Roy asked Sarah Bukowski who shot her and what happened. (XVII 1563) Sarah Bukowski responded that she did not know. (XVII 1564) The semi automatic pistol that was on the bedroom floor sustained a cartridge feed malfunction and was jammed. (XVII 1565) The revolver that was found in the living room had the hammer cocked back. (XVII 1572)

Roxanne Larabie was Justin Heyne's girlfriend at the time of the shooting. (XVII 1587) After the shooting, Heyne called Larabie and had her pick him up. (XVII 1588) The appellant seemed upset, irritated and scared. (XVII 1588) When Larabie picked up the appellant he had a pillow case with him. (XVII 1588) The appellant told Larabie that there was a gun in the pillow case. (XVII 1588) The appellant told Larabie that he shot Ben and Sara. (XVII 1590) Larabie asked the appellant about Ivory Hamilton and he replied she was gone. (XVII 1590) The

appellant then wanted Larabie to take him to the mall to buy replacement clothes. (XVII 1590) The appellant drove and took an unusual route. (XVII 1590) The appellant drove by his residence on Moon Road and she saw police responding to a crime scene. (XVII 1591)

After shopping at the mall, the appellant returned to Larabie's house. (XVII 1594) The appellant's mother called Larabie's house, and the appellant was picked up by his mother. (XVII 1595) After the appellant left, Larabie received a call from the Titusville Police Department. (XVII 1595) Larabie was asked whether or not she had been with the appellant that day. (XVII 1595) Larabie told the police that she was not with the appellant that day. (XVII 1596) Subsequently, Titusville Detective Watson came to the house and Larabie gave consent for him to search the attic. (XVII 1596) Detective Officer Watson found compressed marijuana and a small red novelty tin containing powder cocaine in the attic. (XVIII 1628) The Detective also found a pair of black shorts, a pair of Reebok tennis shoes, and a handgun wrapped in a tee-shirt. (XVIII 1650,1653)

Dr. Sajid Quaiser is the medical examiner that performed the autopsies on the three shooting victims. (XVIII 1667) The victim Benjamin Hamilton had a gunshot to the head with an entrance wound and an exit wound. (XVIII 1673) Hamilton had an entrance wound on the left temple. (XVIII 1678) There was no

stippling present that would suggest that the distance from the shooter was in determinant. (XVIII 1679) The shot to Hamilton traveled from left to right downward and backward. (XVIII 1680) The exit wound was on the opposite side of the victim's head. (XVIII 1680) The bullet that killed Benjamin Hamilton could have also killed Sarah Bukowski. (XVIII1735) Hamilton's cause of death was a gunshot wound to the head. (XVIII 1680)

Dr. Quasier performed an autopsy on Sarah Bukowski. (XVIII 1681) Bukowski had a gunshot wound to her arm. (XVIII 1686) The gunshot was to the left arm and there was an entrance wound and exit wound. (XVIII 1686) There was no stippling on the gunshot wound to the arm. (XVIII 1687) The victim Sarah Bukowski also had a gunshot wound to the center of the head. (XVIII 1690) The entrance wound was to the occipital bone, and there was a partial exit. (XVIII 1690) The wound to the head was abraded meaning it was a wider abrasion. (XVIII 1693) This wound was not a direct hit, and that after perforating through another body surface the bullet began to wobble. (XVIII 1694) Because the bullet wobbled it made a wider area of abrasion on impact. (XVIII 1694) It was likely that there was one shot that went through Bukowski's arm and then entered her skull. (XVIII 1694) The shooting was consistent with someone who was trying to stave off the bullet or attack with her arms. (XVIII 1694) Bukowski's cause of

death was multiple gunshot wounds. (XVIII 1699)

Dr. Quaiser also performed the autopsy on Ivory Hamilton. (XVIII 1696) Ivory Hamilton was a child, and she had a gunshot wound to the head and a pattern contusion on the left cheek. (XVIII 1696) The contusion on Ivory's face was consistent with a slap. (XVIII 1697) The slap to Ivory Hamilton's cheek occurred approximately the same time as her death. (XVIII 1702) The entrance wound to Ivory Hamilton was on the left side of the head and had gun powder stippling. (XVIII 1704) The gun powder stippling shows that the mussel of the gun was within two feet of the victim at the time of the shooting. (XVIII 1705) Ivory Hamilton's cause of death was a gunshot wound to the head. (XVIII 1707)

The linear abrasions on Ivory Hamilton's cheeks could have occurred hours before the killing. (XVIII 1724) The abrasions to the cheek were consistent with a slap but could have been caused by anything. (XVIII 1724) The wound to Ivory Hamilton was on a downward angle. (XVIII 1732) The shot to Ivory Hamilton was also consistent with a child running in front of the gun. (XVIII 1732) Once Ivory Hamilton was shot she would have been completely incapacitated. (XVIII 1733) The linear abrasions on Ivory Hamilton's cheek occurred were just before death, or up to four hours before her death because the cheek surface had an edema that is a very active inflammation. (XVIII 1737)

There was drug paraphernalia and drugs, specifically marijuana found in the victim's bedroom. (XVIII 1761, 62) There was a gun and gun case located under the victim's bed. (XIX 1825) There was also a twenty-two caliber revolver in a zippered leather case on the night stand in the bedroom. (XIX 1826) Law enforcement was unable to do a reconstruction of the shooting. (XIX 1837) The blood splatter analysis was tainted by alterations from paramedic efforts. (XIX 1837) There was no trajectory construction analysis either because the analyst could not find two fixed points to ascertain where the shooter was positioned. (XIX 1838) The bullet that was removed from the body of Ivory Hamilton was fired from a .38 special Taurus Revolver. (XIX 1933) The trigger pull on the Taurus .38 special revolver was 10½ to 11 pounds. (XIX 1937)

The appellant was interviewed by the Titusville police. (S 8) The appellant had been living at 4545 Moon Road for the past five months. (S 11) The appellant described Ben as "like a brother to him, the only living brother he had." (S 12) The appellant first denied being at his house at the time of the shooting. (S 19) The appellant explained that there were guns in the house including a .357, a "baby .9," a .12 gauge shotgun and a "tech 9." (S 21) The appellant admitted that his roommate sold marijuana out of the house. (S 22) The appellant stated that he treated Ivory like she was his niece. (S 111) The appellant explained that Ivory

called him Uncle J.C.D. (S 111)

After being confronted with some evidence of the crime, the appellant confessed. (S 116) The appellant explained that he and Ben were talking and Ben started treating appellant like he was a nobody. (S 116) The appellant told Ben not to disrespect him. (S 116) Ben called the appellant a “fuck boy” and demanded $300.00. (S 116) Ben then “tried” the appellant and the appellant was “well, you know, whatever.” (S 117) When the appellant went to walk away he heard the “little Baby 9" cock. (S 117) The appellant stated that Ben did not point the gun at him. (S 117) The appellant and Ben were arguing and fighting, but we did not throw any punches, just words. (S 118) The appellant then had trouble remembering what happened next. (S 119) The appellant was asked how Ivory got struck and he thought that she had gotten in the way and that he would never hurt her on purpose. (S 120)

The appellant explained the incident again. (S 121) The appellant did not recall Sarah and Ivory coming into the room. (S 121) The appellant pushed Ben onto the bed during the argument. (S 121) When Ben was pushed to the bed he had the Baby 9. (S 122) The appellant could not recall where the shots went or anything. (S 122) The events happened so fast. (S 122) The appellant did not know when Ivory had run into the room. (S 122) During the argument Sarah

walked in the room and asked Ben why the safe was open. (S 123) When Sarah walked into the room appellant was to the left of the bed by the dresser. (S 123) After Ben was pushed on the bed the appellant shot him. (S 124) Sarah was on the side of the bed and then another shot went off. (S 126) Prior to the shooting Ivory had come into the room to give Ben a hug and a kiss. (S 127) Ben then told Ivory to "baby, go ahead and get up out of the room." (S 128) The first shot occurred as Ivory was walking out of the room. (S 128) Sarah ran into the room to her side of the bed. (S 128) Then there was "like a boom." (S 129) While appellant was shooting the gun Ivory had pulled on his shorts. (S 129) After the first shot was fired Ivory jerked on the appellant's pocket and Ivory was like stumped, she did not know what to do, she was in shock. (S 131) As the appellant fled he knew that "he had gotten into it with Ben," but he did not think Ivory or Sarah had gotten hurt. (S 129)

The appellant explained the sequence of the shooting. (S 131) The appellant first shot Ben. (S 131) After the second shot Sarah came running into the room. (S 131) The appellant got 'really spooked, real panicked." (S 131) The appellant shot a second time and saw Ivory and Sarah both go down. (S 131) The appellant said I am going away for the rest of my life, and I deserve it. (S 131) The appellant stated that he feels like he should have put the pistol in his own mouth and shot

himself. (S 135) The shooting of Ivory hurts him more than anything. (S 135) The appellant hoped he could get help to help fix whatever his problem was. (S 137) The appellant explained that he had a lot of anger inside. (S 137)

Ben had the gun in his hand while he was laying in the bed and it dropped out of his right hand and the appellant grabbed the gun and picked it off the ground. (S 148) The appellant then pointed the gun on Ben and he may have turned his head at the time that he fired. (S 149)

When Sarah and Ivory had walked in the room the appellant and Ben were already going at it. (S 157) The appellant said “And I don’t leaving - - -you know what I mean, either we shake hands or we do what we gotta do.” (S 157) The appellant was not worried about witnesses. (S 157) The appellant shot Sarah because she was screaming and he was in panic. (S 158) The appellant then claimed that he remembered firing one shot with the “Baby 9" and three shots with the gun in the box. (S 162) The appellant stated that he did not purposely shoot Ivory. (S 164)

Michelle Collin is the next door neighbor of the Hamilton. (XX 2074) At the time of the shooting, she heard a couple of pops and remembered it was more than three but less than six. (XX 2075) The sequence of the pops was very fast. (XX 2075) Collin believed that the noises were from construction on a house on

the other side down the street. (XX 2083) Collin had heard construction noises throughout that day and the previous days. (XX 2083) Collin had heard the construction workers using a nail gun before. (XX 2084) She had not heard the nail gun that day but the previous days. (XX 2084)

Penalty Phase

Lori Swab is a program specialist for the Osceola County public school system. (XXI 2396) Swab taught the appellant at Michigan Avenue Elementary. (XXI 2397) Ms. Swab taught the appellant in a special education classroom. (XXI 2397) The appellant was a nice little boy, he was athletic, and well liked. (XXI 2398) Anything the appellant was asked to do in the classroom he did. (XXI 2398) The appellant's behavior in the classroom was very good and respectful. (XXI 2398) The appellant did not pick on other kids. (XXI 2398) The appellant would stop bullies who were picking on others by just telling them to knock it off. (XXI 2398) The appellant gave Ms. Swab a picture of him in his football uniform. (XXI 2399)

Lauren Harvin was one of the appellant's teachers at the special education section in Osceola County, Florida. (XXII 2417) The appellant was a tall, big, happy "teddy bear" like kid. (XXII 2418) The appellant was disappointed that he was not at his school but was happy and always did his work. (XXII 2418) The

appellant was calmer than the other students and a leader that came in and did his work everyday. (XXII 2418) If the students were playing a game at lunch and it got out of hand and kids were not following the rules, the appellant would teach them the rules and calm them down. (XXII 2418) The appellant was a good kid and he did not like other kids getting picked on, especially little ones. (XXII 2418) The appellant sometimes had problems picking up social ques from other people. (XXII 2420) The appellant sometimes missed social ques and they just went right by him. (XXII 2420)

Bill Hottenstein taught the appellant in the Osceola County Alternative School for secondary students with emotional difficulties. (XXII 2422) The appellant had a double classification, specific learning disabilities and emotional difficulties. (XXII 2422) The appellant was a very good athlete but rules prohibited him from participating in the athletic program. (XXII 2423) The appellant was a positive leader in the class. (XXII 2425) The appellant was the most positive student he had in the classroom. (XXII 2425) The appellant helped many times with the student population. (XXII 2425) The appellant was always kind, always compassionate and always considerate to the loser in the class, or the kid that everybody picked on. (XXII 2426)

Dr. William Riebsame is a forensic psychologists that interviewed and tested

the appellant. (XXII 2442) Dr. Riebsame had eight meetings with the appellant over the past three years. (XXII 2442) The meetings included interviews as well as psychological testing, and approximately twenty hours of face to face interviews with the appellant. (XXII 2442) Dr. Riebsame also reviewed records including school records, medical records, public corrections records and the police reports in the case. (XXII 2442)

The appellant has a very long standing history of emotional behavior problems dating back to when he was five years old. (XXII 2443) The appellant was born a month late, and it was a difficult delivery. (XXII 2445) The appellant was slow to walk, slow to talk, did not start putting sentences together until he was about four years of age, but he was very active and very aggressive. (XXII 2446) The appellant's parents took him to see a child psychiatrist when he was five years old following a suspension from kindergarten where he had been aggressive towards a school teacher. (XXII 2446) The child psychiatrist at the time recommended his placement in Lauren Oaks Mental Hospital in Orlando. (XXII 2446) The appellant's parents did not take that recommendation because they did not want to hospitalize their five year old child. (XXII 2446) The appellant was diagnosed with an attention deficit hyperactivity disorder and he was placed on Ritalin and Adderall. (XXII 2446) The appellant did well through fifth, sixth and

seventh grade on medication. (XXII 2446) When the appellant entered high school he was less consistent with his medication and had problems in school academically. (XXII 2447) The appellant was reading at about the fifth grade level and was placed in learning disability classes. (XXII 2447) The appellant did well in vocational classes but at sixteen and seventeen years of age began to get in trouble with the police and stopped attending school in the twelfth grade. (XXII 2447) Dr. Riebsame diagnosis at the time of the offense was that the appellant had attention deficit hyperactivity disorder, alcohol dependance and cocaine dependance. (XXII 2448)

The appellant was treated for bipolar disorder in prison. (XXII 2450) The appellant was prescribed a mood stabilizer known as Lithium, and was prescribed anti-depressants to stabilize his moods. (XXII 2450) The appellant had several suicide attempts in prison and got in trouble as a result of his aggressive behavior in prison. (XXII 2451) The appellant manages his moods often times through drug abuse and alcohol abuse. (XXII 2451) When agitated the appellant will use alcohol to calm down and when feeling depressed he will use cocaine to pick himself up. (XXII 2451) Prior testing identified mild impairment and the potential for impulsivity. (XXII 2454) The test data supported findings that the appellant had poor impulse control and signs of childhood trauma. (XXII 2454) The

appellant also had PET scan imaging that showed evidence of some sort of brain abnormality in the temporal and parietal lobes. (XXII 2455) The temporal and parietal lobes are primarily associated with language development. (XXII 2456)

After his release from prison in November of 2004 the appellant was "Baker Acted." (XXII 2456) It was an involuntary psychiatric hospitalization. (XXII 2456) The appellant was found intoxicated and attempted to throw himself in front of a train. (XXII 2456) He was rescued by one of his siblings. (XXII 2456) The shooting at the Hamilton house occurred months after the appellant's hospital discharge. (XXII 2457) The appellant stated that he had been snorting cocaine with Benjamin Hamilton Saturday, Sunday, Monday and Tuesday or for four days before the shooting, and the day of the offense he had also sniffed cocaine with Mr. Hamilton. (XXII 2462) The day of the shooting the appellant estimated that he snorted approximately four to eight grams of cocaine that day. (XXII 2462) The appellant also smoked some marijuana and consumed about ten beers from the morning hours until early afternoon. (XXII 2462)

The appellant admitted having an ongoing conflict with Mr. Hamilton. (XXII 2463) The appellant had been angry with Mr. Hamilton about Mr. Hamilton selling drugs out of the house while the appellant was selling drugs on the street. (XXII 2463) The appellant did not want drugs to be sold out of the house. (XXII

2463) The appellant also had a disagreement with Mr. Hamilton over money. (XXII 2463) Mr. Hamilton was also angry and concerned that his girlfriend Sarah Bukowski, the mother of Ivory Hamilton, might be cheating on him with another man. (XXII 2463)

The appellant confided to Dr. Riebsame that he shot Mr. Hamilton and then Sarah came into the bedroom screaming. (XXII 2464) Sarah then dove underneath the bed and he thought she was going for a gun so he shot her. (XXII 2464) The appellant then recalls the little girl Ivory tugging on his pants and then she was shot as well. (XXII 2464) The appellant stated over and over again he could not remember how he shot Ivory Hamilton but he is the one responsible for shooting her. (XXII 2464)

In Dr. Riebsame's expert opinion, Heyne was under extreme mental disturbance at the time of the shooting because of his mental disorder as well as his intoxicated state of mind. (XXII 2466) Moreover, Heyne's capacity to conform his conduct to the requirements of law were also substantially impaired. (XXII 2466) The appellant was twenty five at the time of the shooting but he had the mental and emotional maturity level of a sixteen or seventeen year old. (XXII 2467)

The appellant scored 88 on the adult IQ test. (XXII 2470) The appellant's verbal IQ was 85. (XXII 2471) The 88 score is the top end of the below average

range. (XXII 2471) Dr. Riebsame reviewed a toxicology report of Benjamin Hamilton on blood drawn from him on March 30, 2006 at 5:00pm. (XXII 2597) The toxicology report indicated that Benjamin Hamilton did not have cocaine in his system. (XXII 2597)

Dr. Joseph Wu is an expert in PET scan imaging and performed a PET scan on the appellant. (XXIII 2650) The appellant's PET scan showed abnormality in the temporal lobe and parietal lobe. (XXIII 2674) The appellant has significant asymmetry in the left temple lobe area of his brain. (XXIII 2676) This kind of asymmetry is seen in patients who have some history of brain trauma, or some type of traumatic brain injury. (XXIII 2677) Patients with brain injury are more likely to develop addiction problems because of their poor impulse control. (XXIII 2679) The temporal lobe of the brain is one of the areas that has been shown to be implicated in individuals with impaired impulse control, and some being the frontal lobe. (XXIII 2685) People suffering with temporal lobe injury are more likely to have some significant problem with aggression and impulse than an individual with an intact temporal lobe. (XXIII 2686) In the shooting of Sarah Bukowski the appellant was not able to appropriately control and contain his impulses given his injured brain and the substances on top of it. (XXIII 2704) The appellant had a temporal lobe which is malfunctioning and he consumed cocaine

and alcohol on top of that, its like pouring gasoline on a fire. (XXIII 2705) Once an aggressive impulse is triggered under these circumstances, it is difficult to contain those impulses in a normal manner. (XXIII 2705)

Dr. Wu opined that the appellant was under the influence of extreme mental emotional disturbance at the time of the shootings. (XXIII 2706) Moreover, Dr. Wu believed at the time of the shootings the appellant's capacity to conform his conduct to the requirements of law was substantially impaired. (XXIII 2706)

The appellant and his older sister Jeanna Heyne had a close bond together. (XXIV 2820) The appellant helped his sister with her car payment and would come to her house and help her clean-up. (XXIV 2821) Jeanne Heyne confirmed that the appellant had a alcohol and drug abuse problem for some time before the shooting. (XXIV 2821) The appellant called Benjamin Hamilton the brother that he never had. (XXIV 2823) Ivory Hamilton was like a niece to the appellant. (XXIV 2823)

Darel Heyne, the appellant's father, stated that appellant was always behind and slow in his speech development, and his walking. (XXIV 2826) The appellant's older brother started walking at seven months old. (XXIV 2826) The appellant was a year and a half before he was able to walk. (XXIV 2826) It was not until the appellant was three years old that he could really put sentences

together. (XXIV 2827) Disciplining the appellant was extremely hard. (XXIV 2827) He seemed he was tough but not smart, he was strong, big, but almost rebellious at times. (XXIV 2827) It took a while to learn how to punish the appellant. (XXIV 2827) If you would show him love, put your arm around him, explain to him that its alright everybody spills milk, and it was not a big deal then he would cooperate and help you clean up. (XXIV 2827)

When the appellant was three years old he had an accident where he banged his head on a piece of furniture which required stitches and overnight observation for a mild concussion. (XXIV 2829) The appellant played football until his freshman year of high school and was not allowed to play thereafter due to his grade average. (XXIV 2826) The appellant was devastated by not being able to play football. (XXIV 2826)

The appellant's father had a construction company and the appellant and Ben Hamilton worked together in his company. (XXIV 2840) The appellant and Hamilton had a very tight bond. (XXIV 2841) They got along like brothers. (XXIV 2841) The day of the shooting, the appellant's mother picked him up at Roxy's house and brought him home. (XXIV 2852) The appellant's father had seen him under the influence of drugs before. (XXIV 2852) At the time it appeared like the appellant was coming down from his drug use. (XXIV 2852)

The appellant had a polite look and was not really responding to any kind of conversation. (XXIV 2852) The appellant was then taken to the scene of the shooting where he learned that Ivory Hamilton had died. (XXIV 2853) The appellant fell to his knees and just started crying. (XXIV 2853)

STATE REBUTTAL

Officer Jeff Watson of the Titusville Police Department and Deputy Arthur Espozito of the Titusville Police Department both interviewed the appellant hours after the shooting. (XXIV 2888, 2897) Officer Watson believed that the appellant was not under the influence of alcohol or cocaine at the time of the arrest. (XXIV 2890) Deputy Espozito believed that the appellant was not under the influence of cocaine or alcohol at the time of his arrest. (XXIV 2900)

SUMMARY OF ARGUMENT

Point I: The state's case for premeditated murder is circumstantial. Where the element of premeditation is sought to be established by circumstantial evidence, the evidence must be inconsistent with every other reasonable inference. The evidence is equally consistent that the appellant's action lacked the requisite premeditation, and therefore, this Court should reverse the judgement and convictions for first degree murder and have the charges reduced to second degree murder.

Point II: The murder of Ivory Hamilton was by a single gunshot wound to the head. Ivory Hamilton's death was instantaneous. The trial court found the EHAC aggravating factor because of the terror and fear experienced by Ivory Hamilton when she witnessed the murder of her parents. Specifically, Hamilton heard a gunshot and saw her father shot in the head and then witnessed her mother's murder. These findings are not supported by the evidence.

Point III.: The appellant presented the testimony of two experts Dr. William Riebsame and Dr. Joseph Wu in support of the two statutory mental mitigators.[6] The state presented no evidence to rebut their expert determination

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[6] The capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired; The capital felony was committed while the defendant was under the influence of extreme

that both statutory mitigating circumstances applied in this case. The trial court rejected the testimony of two experts who testified on this matter, Dr. Riebsame and Dr. Wu, without providing "a rational basis." The trial court did not cite any impeachment of Dr. Riebsame or Dr. Wu's testimony or other evidence that conflicted with Heyne's claim that the two statutory mental mitigators apply in this case. This is error.

Point IV: The death sentence is disproportionate when compared with similar cases where the aggravating circumstances are few and the mitigation, especially the mental mitigation, is substantial.

Point V: Florida's death sentencing scheme is unconstitutional under the Sixth Amendment pursuant to ***RING V. ARIZONA***.

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mental or emotional disturbance.

POINT I

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL ON EACH COUNT OF FIRST DEGREE MURDER WHERE THE FINDING OF PREMEDITATION IS NOT SUPPORTED BY THE EVIDENCE.

After the state rested their case the appellant moved for a judgment of acquittal on all three counts. On Count I (premeditated murder of Benjamin Hamilton) the appellant argued that he was confronted by the use of deadly force by Hamilton and justifiably used deadly force to defend himself. Appellant also argued that the shooting of Sarah Hamilton was in self-defense (Count II). The appellant argued that Sarah Bukowski was going to her side of the bed and kneeled down where a known weapon was located and when she came back up she was shot. These facts would support a reasonable hypothesis that he had proper use of deadly force.

Should the trial court not accept this argument, in the alternative the appellant argued that on Count I and II a judgement of acquittal should be granted or the cases reduced to second degree murder or manslaughter based on ***Fennel v. State***, 959 So.2d 810 (Fla. 4th DCA 2007) because the state failed to prove

premeditation. The appellant also cited ***Green v. State***, 715 So.2d 940 (Fla. 1998) (Lack of preconceived plan). The appellant moved for a judgment of acquittal as to Count III (murder of Ivory Hamilton) on the grounds that it was an accident and therefore excusable homicide. The trial court denied the Motions for Judgment of Acquittal. After the appellant rested, he renewed his Motion for Judgment of Acquittal as to Counts I, II and III. The trial court denied the renewed Motions for Judgment of Acquittal. This was error.

The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being constitutes murder in the first degree. 782.04(1)(a)1., Fla. Stat. Premeditation is the essential element that distinguishes first-degree murder from second-degree murder. ***See Green v. State***, 715 So.2d 940, 943 (Fla.1998). "Premeditation can be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.' " ***DeAngelo v. State***, 616 So.2d 440, 441-42 (Fla.1993) (quoting ***Asay v. State***, 580 So.2d 610, 612 (Fla. 1991) Where the element of premeditation is sought to be established by circumstantial evidence, the evidence must be inconsistent with every other reasonable inference. ***Cochran v. State***, 547 So.2d 928, 930 (Fla.1989). Premeditation may be inferred from:

> the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted. It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of the victim is concerned.

Jackson v. State, 575 So.2d 181, 186 (Fla.1991) (quoting ***Sireci v. State***, 399 So.2d 964, 967 (Fla.1981)); ***See also Norton v. State***, 709 So. 2d 87 (Fla. 1997) A jury is not required to believe a defendant's version of events where the state introduces conflicting evidence. ***DeAngelo***, 616 So.2d at 442.

The state's evidence of premeditation comes from the appellant's confession, and the testimony of first responders to the scene. The following was the appellant's confession detailing the events surrounding the murders:

HEYNE: The first – the first shot was – it had to have been Ben. Because Ben, and then the second shot

LEO: Is that when Sarah come running into the room, or was she already in there?

HEYNE: No, the – yeah, the second shot is when she come flying through.

LEO: Yeah.

HEYNE: I think I got really spooked, real panicked and just –

LEO: And the second shot went off, and did you see Sarah go down?

HEYNE: I seen them both go down.

LEO: Who – was who's "both"?

HEYNE: Ivory and Sarah.

LEO: Ivory and Sarah?

HEYNE: Yeah.

LEO: So then when you heard boom-boom-boom, okay, Ben Went down on the bed. And then you – then you saw Sarah And you saw Ivory go down?

HEYNE: Uh-huh.–

LEO: Okay. And did you see blood?

HEYNE: No.

LEO: No? What did you do after the – after you saw them all go down after the three shots?

HEYNE: I ran like hell. (S 131, 132)

The appellant further explained that the argument between him and Benjamin Hamilton began before Sarah Bukowski and Ivory Hamilton came home. When Sarah and Ivory came into the room "me and Ben were already going through it – And I don't leaving – you know what I mean, either we shake hands or we do what we got to do."

The testimony of first responder Yvette Bernard stated that Benjamin Hamilton was lying on his back on the bed trying to breathe, Sarah Bukowski was

crouched on the right side of the bed with her head under the bed, and Ivory Hamilton was behind her mother's feet, lying against the wall in the fetal position.[7]

State Case for Premeditation

The state's case for premeditation can be found in the state's closing argument. In closing argument the state claimed that the evidence supported the following claims:

1) The appellant slapped Ivory Hamilton in the face because she was screaming, and then executed her. (XX 2164)

2) The appellant had to walk several feet to get to Ivory Hamilton, and that supports premeditation. (XXI 2226)

3) The appellant went into Benjamin Hamilton's room and either Benjamin Hamilton is going to respect him or Benjamin Hamilton is going to be dead. (XXI 2227)

4) He shot Sarah Bukowski across the room, that's not an easy shot. That screams he's intending to kill. (XXI 2228)

5) The appellant's statement that "I'm going away for the rest of my life and I deserve it." This is first degree murder. (XXI 2228)

6) The appellant's statement to Roxanne Larabie that I am going to hell.

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[7] Officer Roy and Officer Hunter were the first police to respond to the

(XXI 2230)

The inferences that can be drawn from the evidence equally support a finding of second degree murder. The weapon used was a handgun, and from the testimony of the neighbor the shots were without pause and done quickly. There was provocation in the sense that the appellant and the victim were in a heated argument preceding the shootings. There were no evidence of previous difficulties between the parties. On the contrary, the evidence was that the victims in this case were beloved by the appellant and were like family to him. The evidence supports that homicides occurred just as the appellant described, and the argument that the appellant walked across the room, slapped Ivory Hamilton, and then pointed the gun and shot her is not consistent with the statement of the neighbor that the shots were in an immediate sequence.

This Court has found that where shots are fired suddenly at an eleven year old girl during a brief encounter between her father and the defendant, the evidence clearly sustains a charge of murder in the second degree. ***See Purkhiser v. State***, 201 So. 2d 448 (Fla. 1968) In ***Knowles v. State***, 632 So. 2d 62 (Fla 1994) this Court found that Knowles' prior statement, made while he was drinking, that he just might lose it and start shooting people in the trailer park is insufficient to

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scene. They both testified that Hamilton was on the bed lying on his stomach.

support a finding of premeditation where he shot a young girl he never met. **Purkhiser** and **Knowles** are only distinguished from this case because there was an eyewitness that corroborated the defendant's version of events. Had the appellant had an eyewitness to corroborate his confession, he would have only been culpable for second degree murder. However, he does have the testimony of the neighbor that testified that the she heard the sound of "pops", more than three and less than six, and the sequence was fast.

The state's case for premeditation is circumstantial. Where the element of premeditation is sought to be established by circumstantial evidence, the evidence must be inconsistent with every other reasonable inference. Here, the evidence is equally consistent that the appellant's action lacked the requisite premeditation, and therefore, this Court should reverse the judgement and convictions for first degree murder and have the charges reduced to second degree murder.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL WHERE THE EVIDENCE DID NOT SUPPORT THE AGGRAVATING FACTOR.

The appellant repeatedly objected to the trial court considering the Especially Heinous, Atrocious and Cruel ("EHAC") aggravating circumstance concerning the murder of Ivory Hamilton. (XXI 2393, 2905) The appellant argued there was no evidence presented of additional acts which demonstrate the murder of Ivory Hamilton was intended to be unnecessarily torturous, and there was no evidence that there was unnecessary pain. The trial court denied the motion for judgment of acquittal. In the sentencing memorandum, the defense counsel argued that the (EHAC) aggravating factor was not proven, and further argued that if there was insufficient evidence of EHAC in the murder of Sarah Bukowski there was equally insufficient evidence to support EHAC for the murder of Ivory Hamilton. The trial court nonetheless found that the EHAC aggravating factor applied. This was error.

In finding this particular aggravating factor, the trial court stated:

> The death of Ivory Hamilton was instantaneous but it only came after Ivory had witnessed the murder of her father and mother. While the series of events occurred relatively quickly, Ivory heard the noise of the discharge of a large

> caliber hand gun and saw her father shot in the head. Then she saw her mother screaming and heard another shot while she witnessed her mother's murder. Finally, while crying in panic, she tugged at the defendant's shorts and was shot in the head. The time may have been short between the first shot and the last, but Ivory experienced terror and fear no five year old child should ever experience in those brief moments.

Any murder could be characterized as especially heinous, atrocious, or cruel. However, to avoid such an overly broad and unconstitutional application of EHAC, restrictions have been placed on this aggravating factor. It is well-settled that the aggravator does not apply unless it is clear that the defendant intended to cause unnecessary and prolonged suffering. ***Bonifay v. State***, 626 So.2d 1310, 1313 (Fla. 1993). Also, any "instantaneous or near instantaneous death" does not qualify as EHAC. ***Donaldson v. State***, 722 So.2d 177, 186 (Fla. 1998).

The State has the burden of proving aggravating circumstances beyond a reasonable doubt. ***Robertson v. State***, 611 So.2d 1228, 1232 (Fla. 1993). Moreover, even the trial court may not draw "logical inferences" to support a finding of a particular aggravating circumstance when the state has not met its burden. ***Clark v. State***, 443 So. 2d 973, 976 (Fla. 1983) However, more recently, this Court has stated that it is not within its function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt. "Rather, our task on appeal is to review the record to determine

whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." ***Willacy v. State***, 696 So.2d 693, 695 (Fla. 1997). ***See also***, ***Way v. State***, 760 So.2d 903, 918 (Fla. 2000).

In the instant case the trial court found EHAC because of the terror and fear experienced by Ivory Hamilton when she witnessed the murder of her parents. Specifically, Hamilton heard a gunshot and saw her father shot in the head and then witnessed her mother's murder. These findings are not supported by the evidence.

There is no physical evidence that provides any certainty concerning how the murders occurred. The crime scene technicians could not reconstruct the shooting because the crime scene was compromised by rescue personnel. The evidence of the shooting came from the appellant's confession and the testimony of neighbors Yvette Bernard and Michelle Collin, and the testimony of Officer Roy.

Appellant's Confession

The appellant provided several versions of the shooting to police and Dr. William Riebsame. The appellant told the police and Dr. Riebsame that he shot Benjamin Hamilton first in his bedroom. Prior to the shooting Hamilton and the

appellant were arguing. During the argument both Sarah Bukowski and Ivory Hamilton came home and came into the bedroom to visit with Benjamin Hamilton. The shooting began after Bukowski and Ivory Hamilton left the room. Sarah ran into the room to her side of the bed. While appellant was shooting the gun Ivory had pulled on his shorts. After the first shot was fired Ivory jerked on the appellant's pocket and Ivory was like stumped, she did not know what to do, she was in shock. Then there was "like a boom boom boom." Both Bukowski and Hamilton went down.

The appellant told Dr. Riebsame he shot Mr. Hamilton and then Sarah came into the bedroom screaming. Sarah then dove underneath the bed and he thought she was going for a gun so he shot her. The appellant then recalls the little girl Ivory tugging on his pants and then she was shot as well. The appellant stated over and over again he could not remember how he shot Ivory Hamilton but he is the one responsible for shooting her.

Testimony of Yvette Bernard

Bernard went to the Hamilton house and found that the front door was ajar. Bernard then heard Sarah Bukowski hollering "somebody please help me, somebody please help me." Bernard ran back to the back bedroom and she saw Benjamin Hamilton lying on the bed and he was struggling to breath. Then

Bernard noticed Sarah on the floor beneath the bed. Sarah was in the fetal position and her face down underneath the bed frame and she was just screaming for help. Bernard told Sarah that she was going to get help and then noticed the lifeless body of Ivory Hamilton lying in a fetal position nearby.

Testimony of Michelle Collin

Michelle Collin was the next door neighbor of Benjamin Hamilton. At the time of the shooting, she heard a couple of pops and remembered it was more than three but less than six. The sequence of the pops was very fast.

Testimony of Officer Brian Roy

Officer Brian Roy of the Titusville Police Department was the first officer to respond to the scene. Officer Roy asked Sarah Bukowski who shot her and what happened. Sarah Bukowski responded that she did not know.

The evidence presented by the state and appellant relating to the murder of Ivory Hamilton can be stated as follows:

1) Benjamin Hamilton was shot first and survived the murder of Ivory Hamilton;

2) Sarah Bukowski was shot secondly, and survived the murder of Ivory Hamilton;

3) Ivory Hamilton did not witness her father being shot;

4) It is not known whether Ivory Hamilton knew or understood the extent of her father's injuries;

5) Ivory Hamilton likely witnessed a gunshot being fired in the direction of her mother, but whether Ivory Hamilton knew or understood that her mother was actually shot is speculation;

6) Ivory Hamilton was likely shot within an instant of her mother.

The trial court was aware that this was a murder by gunshot with the death of Ivory Hamilton being nearly instantaneous. Therefore, for the EHAC factor to be applicable, the murder had to be especially mentally torturous. ***Wickham v. State***, 593 So.2d 191, 193 (Fla. 1991); ***Richardson v. State***, 604 So.2d 1109 (Fla. 1992). Thus, where a defendant shot a victim causing instant death, this aggravator may have applied because preceding the painless death there was a prolonged or significant period where the victim was aware of his impending death. ***See, e.g., Cooper v. State***, 492 So.2d 1059 (Fla. 1986) (victim bound and helpless, gun misfired three times); ***Preston v. State***, 607 So.2d 404 (Fla 1992) (fear and strain can justify EHAC); ***James v. State***, 695 So.2d 1229, 1235 (Fla.1997) ("[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel). This by all accounts was a quick death, where the victim had

no awareness that she was about to be killed. To be sure, Ivory Hamilton was stunned by the sound of gunfire in the house, but nothing more. Her subsequent murder was nearly instantaneous.

This Court has consistently held that instantaneous or near instantaneous deaths by gunshot, unaccompanied by additional acts to mentally or physically torture the victim, are not especially heinous, atrocious, or cruel. ***See Rimmer v. State***, 825 So.2d 304, 327-28 (Fla.2002) (finding that evidence did not support EHAC where the record did not reveal that the defendant tortured the victims or subjected them to pain and suffering); ***Donaldson v. State***, 722 So.2d 177, 186-87 (Fla.1998) (striking HAC where the defendant forced the victims into a house at gunpoint and, along with accomplices, interrogated them for several hours before handing the gun to an accomplice to shoot the victims); ***Ferrell v. State***, 686 So.2d 1324, 1330 (Fla.1996) ("Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim."); ***Robinson v. State***, 574 So.2d 108, 112 (Fla.1991) (holding that the trial court erred in finding HAC because the fatal shot to the victim "was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence that it was committed 'to cause the victim unnecessary and prolonged suffering'). In other words, "a murder by shooting, when it is

ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not [especially] heinous, atrocious, or cruel." ***Lewis v. State***, 398 So.2d 432, 438 (Fla.1981); ***Diaz v. State***, 860 So.2d 960 (Fla. 2003)

If we approved the application of the EHAC aggravating factor in the instant case without some factual proof of the victims' mental torture, then the factor would apply in every instance where a normal person might feel fear. This would exclude only those homicides where the victim was ambushed or killed without awareness of the assailant. This clearly would go far beyond finding the EHAC factor to be "appropriate in a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " ***Richardson***, 604 So.2d at 1109 (quoting ***Sochor v. Florida***, 504 U.S. 527, 536, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992)). Such a broad interpretation of the EHAC aggravating factor would render it unconstitutional because it would not provide the sentencer with adequate guidance. ***See Sochor***, 504 U.S. at 536, 112 S.Ct. 2114. Accordingly, the EHAC factor is not permissible based on the present facts, and the trial court's finding of this factor was error requiring the appellant's death sentence vacated and the appellant sentenced to life imprisonment.

POINT III

THE TRIAL COURT ERRED WHEN IT REJECTED STATUTORY MITIGATING THAT WAS ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE.

The trial court must find a mitigating circumstance if it "has been established by the greater weight of the evidence." ***Coday v. State***, 946 So.2d 988, 1003 (Fla.2006). "However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection." ***Id***. When expert opinion evidence is presented, it "may be rejected if that evidence cannot be reconciled with the other evidence in the case." ***Id.*** Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons. ***Id.*** at 1005.

The appellant presented the testimony of two experts Dr. William Riebsame and Dr. Joseph Wu in support of the two statutory mental mitigators.[8] The state presented no evidence to rebut their expert determination that both statutory

[8] The capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements of law was substantially impaired; The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

mitigating circumstances applied in this case.[9] Dr. Riebsame had eight meetings with the appellant over the previous three years, which included interviews as well as psychological testing, and approximately twenty hours of face to face interviews. Dr. Riebsame also reviewed records including school records, medical records, public corrections records and the police reports in the case.

Dr. Riebsame explained that Heyne has a long standing history of emotional behavior problems dating back to when he was five years old. The appellant was slow to walk, slow to talk, did not start putting sentences together until he was about four years of age. The appellant's parents took him to see a child psychiatrist when he was five years old following a suspension from kindergarten where he had been aggressive towards a school teacher. The child psychiatrist at the time recommended his placement in Lauren Oaks Mental Hospital in Orlando. The appellant was diagnosed with an attention deficit hyperactivity disorder and he was placed on Ritalin and Adderall.

As a teenager, Heyne was treated for bipolar disorder in prison. Heyne was prescribed a mood stabilizer known as Lithium, and was prescribed anti-depressants to stabilize his moods. Heyne had several suicide attempts in prison

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[9] The state did provide testimony of Officer Jeff Watson and Deputy Arthur Espozito that they did not believe that the appellant was impaired by drugs or alcohol at the time of his interrogation.

and got in trouble as a result of his aggressive behavior in prison.

Upon the release from prison, Heyne managed his moods through drug abuse and alcohol abuse. When agitated Heyne will use alcohol to calm down and when feeling depressed he will use cocaine to pick himself up. Sometimes this did not work well. In November, 2004 the appellant was "Baker Acted." It was an involuntary psychiatric hospitalization. The appellant was found intoxicated and attempted to throw himself in front of a train.

From testing, Dr. Riebsame determined that Heyne had mild impairment and the potential for impulsivity. The test data supported findings that the appellant had poor impulse control and signs of childhood trauma. Dr. Riebsame diagnosis at the time of the offense the appellant had attention deficit hyperactivity disorder, alcohol dependance and cocaine dependance.

The appellant reported to Dr. Riebsame that he had been snorting cocaine with Benjamin Hamilton Saturday, Sunday, Monday and Tuesday or for four days before the shooting, and the day of the offense he had also sniffed cocaine with Mr. Hamilton. The day of the shooting the appellant estimated that he snorted approximately four to eight grams of cocaine that day. The appellant also smoked some marijuana and consumed about ten beers from the morning hours until early afternoon. Dr. Riebsame concluded that the appellant was under extreme mental

disturbance at the time of the shooting because of his mental disorder as well as his intoxicated state of mind. Dr. Riebsame also concluded that the appellant's capacity to conform his conduct to the requirements of law were also substantially impaired.

Dr. Joseph Wu is an expert in PET scan imaging and performed a PET scan on the appellant. The appellant's PET scan showed abnormality in the temporal lobe and parietal lobe. Dr. Wu found that appellant has significant asymmetry in the left temple lobe area of his brain. This kind of asymmetry is seen in patients who have some history of brain trauma, or some type of traumatic brain injury. Patients with brain injury are more likely to develop addiction problems because of their poor impulse control. The temporal lobe of the brain is one of the areas that has been shown to be implicated in individuals with impaired impulse control, and some being the frontal lobe. People suffering with temporal lobe injury are more likely to have some significant problem with aggression and impulse than an individual with an intact temporal lobe.

In Dr. Wu's opinion at the time of the shootings, the appellant was not able to appropriately control and contain his impulses given his injured brain and being under the influence of alcohol and controlled substances. The appellant had a temporal lobe that was malfunctioning and consuming cocaine and alcohol in such

a situation was like "pouring gasoline on a fire." Once an aggressive impulse is triggered under these circumstances, it is difficult to contain those impulses in a normal manner.

Based upon the foregoing, Dr. Wu opined that the appellant was under the influence of extreme mental emotional disturbance at the time of the shootings. Moreover, Dr. Wu believed at the time of the shootings the appellant's capacity to conform his conduct to the requirements of law was substantially impaired.

The trial court considered the unrebutted expert opinion testimony of two experts supporting both statutory mental mitigators, and nonetheless rejected their findings without a rational basis. In sentencing order the trial court found that:

> The combination of brain deficits and consumption of drugs and alcohol at the time of the murders amounts to impairment of the defendant's ability to appreciate the criminality of his conduct or to conform his conduct his conduct to the requirements of law, but not substantial.
>
> He and Benjamin Hamilton had an argument just before the murders and strong words were exchanged between them. While the mitigating circumstance of being under the influence of an emotional disturbance, but not an extreme emotional disturbance, was established by the evidence, it is given little weight.

Although the trial court rejected the two statutory mitigators, it found as a nonstatutory mitigator that "The combination of brain deficits and consumption of drugs and alcohol at the time of the murders amounts to impairment of the

defendant's ability to appreciate the criminality of his conduct." The trial court therefore found credible the testimony that Heyne's drug and alcohol use played a part in the murder and that he was on a cocaine binge at the time. However, the trial court rejected the testimony of two experts who testified on this matter, Dr. Riebsame and Dr. Wu, without providing "a rational basis." ***See Coday***, 946 So.2d at 1005) The trial court did not cite any impeachment of Dr. Riebsame or Dr. Wu's testimony or other evidence that conflicted with Heyne's claim that he was intoxicated and on a cocaine binge at the time of the murder such that his capacity to conform his conduct to the requirements of the law was substantially impaired, and that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Therefore, Judge Eaton erred in rejecting the statutory mitigation.

POINT IV

THE DEATH SENTENCE IS DISPROPORTIONATE WHEN COMPARED WITH SIMILAR CASES WHERE THE AGGRAVATING CIRCUMSTANCES ARE FEW AND THE MITIGATION, ESPECIALLY THE MENTAL MITIGATION, IS SUBSTANTIAL.

This Court has an independent obligation to conduct a proportionality analysis. ***See England v. State***, 940 So.2d 389, 407 (Fla.2006); ***see also*** Fla. R.App. P. 9.142(a)(6). In deciding whether death is a proportionate penalty, the Court conducts a comprehensive analysis to determine "whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." ***Anderson v. State***, 841 So.2d 390, 407-08 (Fla.2003). Accordingly, this Court considers the totality of the circumstances and compares the present case with other similar capital cases. ***See Duest v. State***, 855 So.2d 33, 47 (Fla.2003) This entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." ***Urbin v. State***, 714 So.2d 411, 416 (Fla.1998). In reviewing the sentence for proportionality, this Court accepts the jury's recommendation and the trial court's weighing of the aggravating and mitigating evidence. ***See Bates v. State***, 750 So.2d 6, 12 (Fla.1999).

The trial court found that Heyne suffers from mental illness, has brain damage and brain deficits. The trial court gave these mitigating factors great weight. Moreover, the trial court found that Heyne was under the influence of alcohol and cocaine at the time of the murders. The trial court considered and improperly rejected both statutory mental mitigators (See Point III) and improperly found the EHAC statutory aggravating factor (See Point II). Nonetheless, Judge Eaton overrode the jury recommendation of death for the murder of Sarah Bukowski finding the following:

> The evidence in this case establishes significant mental mitigation. Balancing the mitigation against is a difficult and subjective task. The Court concludes that the mental mitigation does outweigh the aggravation and a life in prison without the possibility of parole is the appropriate sentence for the murder of Sarah Bukowski.

The murder of Ivory Hamilton was an unplanned, senseless murder committed by an emotionally disturbed person who has a history from childhood of psychiatric problems. A the age of five, Heyne was diagnosed with an attention deficit hyperactivity disorder and he was placed on Ritalin and Adderall. As a teenager, Heyne was treated for bipolar disorder in prison. Heyne was prescribed a mood stabilizer known as Lithium, and was prescribed anti-depressants to stabilize his moods. Heyne had several suicide attempts in prison and got in trouble as a result of his aggressive behavior in prison. The improper finding of the EHAC

aggravating circumstance, the improper rejection of two statutory mitigating factors, the facts and circumstances of this case, and the previous rulings of this Court in similar cases support the finding that Heyne's death sentence is disproportionate in this case.

Proportionality review is not merely a comparison between the number of aggravating and mitigating circumstances. Proportionality review requires a discrete analysis of the facts, entailing a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. ***Urbin v. State***, 714 So. 2d 411, 416 (Fla. 1998) Proportionality analysis requires the Court to consider the totality of circumstances in a case, in comparison to other capital cases. ***See Porter v. State***, 564 So. 2d 1060 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991). The Court must compare similar defendants, facts, and sentences. ***Brennan v. State***, 754 So. 2d 1, 10 (Fla. 1999). The standard of review is de novo. ***See Larkins v. State***, 739 So. 2d 90 (Fla. 1999)

In the present case, the aggravating circumstances are arrayed against extensive mitigation, especially mental mitigation. Furthermore, this Court repeatedly has held that substantial mental mitigation makes the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved. ***See Robertson v. State***, 699 So. 2d 1343 (Fla. 1997); ***Sager***

v. State, 699 So. 2d 619 (Fla. 1997); ***Voorhees v. State***, 699 So. 2d 602 (Fla. 1997); ***Morgan v. State,*** 639 So. 2d 6 (Fla. 1994); ***Kramer v. State***, 619 So. 2d 274 (Fla. 1993); ***Penn v. State***, 574 So. 2d 1079 (Fla. 1991); ***Farinas v. State***, 569 So. 2d 425 (Fla. 1990) This is true especially where the heinous nature of the offense resulted from the defendant's mental illness. ***Miller v. State***, 373 So. 2d 882, 886 (Fla. 1979); ***see also Huckaby v. State***, 343 So. 2d 29 (Fla. 1977)(death sentence reversed where evidence showed Huckaby's mental illness was motivating factor in commission of crime), cert. denied, 434 U.S. 920 (1977). As this Court observed in ***Miller***:

> a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse.

Application of these principles mandates a reduction of Heyne's death sentence to life in prison. Heyne's mental illness, brain impairment, history of alcohol and drug abuse, and emotional disturbances places this case among the most mitigated of capital cases. Moreover, the aggravated nature of the crime, as well as the motivation for the crime, were the result of Heyne's emotional disturbance not a desire or design to inflict pain. In his confession, Heyne observed that "I need help with what is wrong with me."

In addition to longstanding drug and alcohol abuse, Heyne has been diagnosed with mental illness, and may have suffered brain damage to his left temporal lobe. Dr. Wu opined that Heyne's brain damage is in a part of the brain that effects decision-making and impulse control. The appellant never received psychiatric treatment for his brain impairment. Rather, the appellant had crisis intervention and being "Baker Acted" when he had a suicide attempt months before the shooting. Heyne's sentence of death is disproportionate when compared with other cases in which this Court reversed the death sentence on proportionality grounds. ***See Hawk v. State***, 718 So. 2d 159 (Fla. 1998).

In ***Hawk***, the defendant brutally beat two elderly persons. This Court reversed the sentence of death, finding the two aggravating factors, which included heinous, atrocious, or cruel, failed to outweigh copious mitigation. The Court noted Hawk started seeing a psychologist at the age of 5 and had poor impulse control even as a child. The trial court found the statutory mitigating factor of substantial impairment and several nonstatutory mitigators, including emotional disturbance, brain damage, and abusive childhood. Considering the nature and extent of both the aggravating and mitigating circumstance, the Court found life in prison the more appropriate sentence.

When the facts of the present case are compared to the preceding cases, it is

clear that equally culpable defendants have received sentences of life imprisonment. ***See Urbin v. State***, 714 So.2d 411, 416 (Fla.1998); ***Snipes v. State***, 733 So.2d 1000 (Fla. 1999); ***Johnson v. State***, 720 So.2d 232 (Fla. 1998) Appellant is mindful that this Court was focused on both Snipes and Urbin's younger age. Heyne was older than Urbin and Snipes, having the biological age of twenty-five at the time of the shooting but according to Dr. Riebsame he had the mental and emotional maturity level of a sixteen or seventeen year old.

This a senseless murder by an emotionally disturbed individual with poor impulse control on a cocaine binge. This is not one of the most aggravated and least mitigated of capital crimes. The death penalty is not the appropriate punishment for Heyne and this Court should reverse his death sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole.

POINT V

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. None of the challenges were successful and Justin Heyne was ultimately sentenced to death. Some challenges were based on a denial of Heyne's Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant also acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and

that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

In the instant case, the jury recommendation for Heyne's death sentence was a majority of ten (10) to two (2). Moreover, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in ***Bottosom*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. The appellant is mindful that this Court has repeatedly found that a ***Ring*** claim

does not apply where a prior violent felony is found. ***See McWalters v. State***, 36 So.3rd 613 (Fla. 2010); ***Deparvine v. State***, 995 So.2d 351 (Fla. 2008) Nonetheless, this Court should vacate appellant's death sentences and remand for imposition of life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17.***

CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, as well as those cited in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate the judgement and sentence, and remand for sentencing for three counts of Second Degree Murder as to Point I; reverse the sentence of death and remand for a new penalty phase, or remand with directions that the appellant receive a life sentence as to Point II and Point III; and vacate the sentence of death and remand with directions that the appellant receive a life sentence as to Point IV and V.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0786438
444 Seabreeze Blvd. Suite 210
Daytona Beach, FL 32118
(386) 252-3367

ATTORNEY 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 Mr. Justin Heyne, DC#X23653, Florida State Prison, 7819 N.W, 228th St., Raiford, FL 32026 this 23rd day of August, 2010.

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GEORGE D.E. BURDEN
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.

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GEORGE D.E. BURDEN
ASSISTANT PUBLIC DEFENDER