IN THE SUPREME COURT OF FLORIDA

JUSTIN RYAN MCMILLIAN,

Appellant,

v.

CASE NO. SC10-2168
L.T. CASE NO. 08-CF-2002

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPLY BRIEF OF APPELLANT

Appellant files this Reply Brief in response to the arguments presented by the state as to Issues 1, 2, and 3. Appellant will rely on the arguments presented in his Initial Brief as to Issue 4.

ARGUMENT

Issue 1

THE STATE'S EVIDENCE WAS INSUFFICIENT TO PROVE THE KILLING OF DANIELLE STUBBS WAS PREMEDITATED.

On pages 51, 54, 64, 65, and elsewhere in the Answer Brief, the state argues that the location of the shell casings and live round in the bedroom proves that McMillian ejected the live round first, then fired and fired again, and that McMillian "shot[] [Stubbs] in the head as he moved closer to her." The state's theory, though a possible scenario, was not proved for several reasons. First, the crime scene was contaminated by the presence

of three family members in the bedroom before the police arrived, including Mrs. Stubbs who laid down on the floor next to her daughter. Thus, the crime scene investigator could not draw any conclusions about the locations of the live round, as well as the two spent shell casings; all he could say is that that's where they were when he got there, after the family members had left the room. Second, the casings are round, they can roll, and the floor was hardwood. Thus, the state's assertion that the bedskirt would have blocked the casing from being dislocated is nothing more than a possibility. Second, there was no expert or other testimony or evidence presented as to how or when the live round might have gotten on the floor.

On page 61, the state argues the DNA evidence, the slats on the floor, the iron on the floor, and the bruises on Ms. Stubbs prove there was a struggle (downstairs) and that McMillian planned to shoot Stubbs in advance of the shooting. None of this evidence proves a struggle. McMillian's DNA on the victim's fingernails proves only that she had touched him or his tissue recently, and since they recently had sex, the DNA says nothing about a struggle. The iron on the floor and the ironing board leaning up against the wall in an apartment Stubbs had moved into two days earlier does not prove a struggle. The medical examiner testified the bruises could have resulted from a fall from bed to floor. As for the slats, although Mr. Stubbs testified neither

he nor his son moved the slats, Mr. Stubbs never mentioned the slats in his deposition. Furthermore, Hunter, the son (Hunter did not testify) ran into the house first, took a right, and went up the stairs. The slats were not "strewn" as if smashed into during a struggle, but were lying on the floor just inside the door, in front of the stairs, and draped over the sofa as if they had been knocked down or fallen when someone came through the sliding glass door. Furthermore, that Ms. Stubbs' clothing was underneath one of the slats is consistent with McMillian's version of what occurred, that he and Ms. Stubbs had sex downstairs, then went upstairs, and that the slats came off when family members entered the sliding glass door the following evening.

On page 63, the state asserts that McMillian suggests it could not be determined "which shot was fired first." McMillian did not suggest this; that's what the medical examiner said.

On page 64, the state suggests that blood spatter on the wall to the left of the bed proves Ms. Stubbs couldn't have been on the bed when the second and fatal shot was fired. Again, this is pure speculation, as there was no testimony about the blood spatter and no testimony about where the head or body could have been in relationship to the bed to leave spatter on the wall when the second shot was fired. The blood spatter on the wall is

equally consistent with the second shot having been fired as Stubbs was moving or rolling off bed.

At page 65, the state says McMillian's statement to police is inconsistent with two quick shots. (The state is referring to the statement given to police in the hospital the day McMillian awoke from a two-week coma, which involved numerous inaudible and monosyllabic responses). McMillian's statement is not inconsistent with two quick shots. McMillian did not say he paused and shot again. Nor did not say he moved closer, as the state argued below, and the trial court incorrectly found in its sentencing order. See Appendix to Initial Brief at page 7.

The state argues that Stubbs did not let McMillian in the house. However, there is no evidence she didn't let him in. When Morris dropped Stubbs off, McMillian's car was in the driveway, and Stubbs showed no concern when she waved good-bye to Morris.

At pages 69-71, the state cites numerous cases as supporting a finding of premeditation in the instant case. The cases cited by the state aren't similar to the instant facts, however.

In Hamblen v. State, 527 So. 2d 800 (Fla. 1988), the defendant robbed a store owner of some cash, then took her to a dressing room, where he told her to disrobe to make it difficult for her to follow him. She told Hamblen she had more money in the back, but as she walked with Hamblen to the rear of the

store, she hit the silent alarm. Hamblen then took her back to the dressing room, where he shot her once in the back of the head, with the gun barrel touching her head. Thus, Hamblen, though angry, made a conscious decision to kill, as evidenced by his walking the victim back to the dressing room and shooting her at close range in the back of the head. These facts are quite different from the instant case, where the evidence is consistent with two quick shots, possibly fired in the dark and during an emotional confrontation with the victim.

In Pietri v. State, 644 So. 2d 1347 (Fla. 1994), the defendant, who had burglarized a home and stolen a pick-up truck, was pulled over by a police officer. As the officer approached Pietri, Pietri removed his pistol from his holster, and when the officer was two to four feet away, Pietri, using both hands, shot the officer in the chest. Again, the facts in Pietri show a deliberateness and reflection not evidenced here.

In Delgado, 948 So. 2d 681 (Fla. 2006), one robbery victim died of multiple bullet and stab wounds, and the other victim died of blunt force trauma and multiple stab wounds.

In Asay, 580 So. 2d 610 (Fla. 1991), the defendant confronted the victim as the victim stood talking outside another man's truck, pulled a gun from his back pocket and shot the victim in the abdomen as the victim backed away. Asay later explained that "you gotta show a nigger who's boss."

In Hernandez-Alberto, 889 So. 2d 721 (Fla. 2004), the defendant knocked his 11-year-old daughter to the floor, then shot her in the back as she lay face-down on the floor.

In Lindsay v. State, 636 So. 2d 1327 (Fla. 1994), both victims died from single shotgun blasts to the head, one from within one to four feet, the other from only inches away.

In Heyward v. State, 24 So. 3d 17 (Fla. 2009), the defendant shot the victim during a robbery, once in the thigh, then again in the chest as the victim was kneeling and saying he didn't have any more [money].

In Tillman v. State, 21 So. 3d 163 (Fla. 4th DCA 2009), the defendant hit the victim in the back of the head from behind, then shot him in the head.

In Holland v. State, 773 So. 2d 1065 (Fla. 2000), the defendant was fleeing after attacking a woman. When confronted by a police officer, the defendant resisted, the two men struggled, and the defendant grabbed the officer's gun from his holster and shot him three times.

None of the above-cases involved an emotional confrontation with a loved one, followed by two quick shots fired in the dark. Rather, the above-cited cases show a level of conscious decision-making, reflection, and knowledge of the consequences not evidenced in the present case. Premeditation was not proved, and this Court should reverse appellant's conviction.

Issue 2

THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING GREAT WEIGHT TO THE FELONY PROBATION AGGRAVATOR.

On page 83, the state incorrectly characterizes appellant's argument in stating that appellant contends that "the withhold of adjudication per se precludes 'great weight.'" Appellant did not make a per se argument, nor did appellant attack the finding of great weight based solely on the fact that adjudication was withheld in the fleeing and eluding case. Appellant argued that the trial court abused its discretion in giving this aggravator great weight because (1) the felony probation status was based on only one prior felony, a fleeing and eluding charge, which resulted in first offender status and adjudication withheld, and (2) the finding of great weight for the aggravator is inconsistent with the court's finding as a mitigating factor that McMillian had no significant prior criminal history (if the fleeing and eluding charge is "insignificant," how can it also be of "great weight"?).

The state also emphasizes that appellant was speeding when he fled the police, putting bystanders in danger. The judge was aware of this fact but nonetheless found in mitigation that McMillian had "no significant prior criminal history." The state does not assert the judge's decision in this regard was arbitrary but asserts with no explanation that the judge's finding was "a gratuity." Answer Brief at 84. Given the criminal histories of

most defendants in capital cases, the trial judge's decision can be deemed neither arbitrary nor merely gratuitous.

Issue 3

THE DEATH SENTENCE IS NOT PROPORTIONATELY WARRANTED BECAUSE THIS COURT HAS REDUCED DEATH SENTENCES TO LIFE IN PRISON IN SIMILAR CASES INVOLVING EQUALLY OR MORE CULPABLE DEFENDANTS.

On pages 94-98, the state cites a number of cases to support its position that the death sentence is a proportionate penalty for McMillian. However, the facts of the crimes and the characteristics of the defendants in the cited cases aren't remotely similar to the present case, and these cases thus are not comparable for proportionality review.

In Phillips v. State, 39 So. 3d 296 (Fla. 2010), the defendant shot a man during a robbery, and later explained that the victim was trying to play "hero," and if he hadn't shot him, Phillips may have ended up in prison for life, and when you try to play hero, "you're ready to go." The aggravators included robbery, avoid arrest, and prior violent felony. The prior violent felony involved shooting his aunt, for which Phillips got 5 years in prison. Also, after the instant crime, but before he was apprehended, Phillips committed another armed robbery involving discharge of a firearm. The facts of the murder were very different from the facts here, and the aggravation was much

stronger in that Phillips previously ahd shot another person and had been in prison before.

In Bailev v. State, 998 So. 2d 545 (Fla. 2008), the defendant shot a police officer because he didn't want to go back to prison. The Court noted that Bailey ''contemplated killing the officer for a significant time period before the shooting occurred." The aggravating factors were avoid arrest and that Bailey was on felony parole at the time of the murder. This Court found the murder proportionate to other cases involving the killing of a police officer, which obviously isn't the case here.

The state also points to Evans v. State, 838 So. 2d 1090 (Fla. 2000). Evans killed his brother's 17-year-old girlfriend two days after Evans' release from prison. Evans was convicted of premeditated murder, kidnapping, and aggravated assault (for threatening to kill two witnesses and their families if they told the police). The two aggravators were prior violent felony and on felony probation. Unlike McMillian, Evans committed this murder and the other crimes after he had been in prison. Furthermore, unlike McMillian, the prior violent felony aggravator was based on three violent felonies, including a brutal attack on a motorist and two batteries on law enforcement officers. Furthermore, unlike the instant case, none of the

mitigating factors "involved the circumstances of the murder itself." 838 So. 2d at 1098-1099.

In McLean v. State, 29 So.3d 1045 (Fla. 2010), the defendant was convicted of first-degree murder, attempted home invasion robbery with a firearm, attempted first-degree murder, kidnapping with intent to commit a felony with a firearm, and attempted robbery with a firearm. McLean killed a 15-year-old during a home invasion robbery, and when asked why, said he "wanted to feel like what it feels like to shoot and kill somebody." The three aggravators were robbery, felony probation, and prior violent felony, which included not only the contemporaneous crimes but a prior armed robbery.

Frances strangled two women, including a 16-year-old girl, with electrical cords and stole a car and jewelry. Frances v. State, 970 So. 2d 806 (Fla. 2007). The aggravators were prior violent felony (based on the contemporaneous murder), robbery, and for one victim, especially heinous, atrocious, and cruel.

Taylor was convicted of first-degree premeditated murder of a woman and attempted first-degree murder of the woman's brother, robbery with a deadly weapon, robbery with a firearm, and armed burglary of a dwelling. Taylor v. State, 937 So. 2d 590 (Fla. 2006). After committing these crimes, Taylor fled with the victim's credit cards, which he used from Tampa to Memphis. In addition to the pecuniary gain aggravator, Taylor was on federal

felony probation when he committed the crimes (Taylor had been in prison for 23 of the last 27 years) and had 2 prior violent felonies (he shot a woman in the neck and back and was convicted of an aggravated violent felony for striking another woman when she discovered him burglarizing her home).

England was sentenced to death for the ''horrible, brutal, bone-crushing beating" of Howard Wetherall. England v. State, 94 0 So. 2d 3 89 (Fla. 2 006) . Four aggravators were found: felony probation, prior violent felony (based on a prior murder very similar to the instant one), robbery, and HAC.

Grim was convicted of first-degree murder and sexual battery on a person 12 years or older. Grim v. State, 841 So. 2d 455 (Fla. 2003) . Three aggravating factors were found, under sentence of imprisonment, sexual battery, and prior violent felony (based on prior convictions of unarmed robbery, kidnapping and robbery, armed burglary and grand theft, and armed burglary and aggravated battery).

In Heath v. State, 648 So. 2d 660 (Fla. 1994), the defendant and his brother met the victim, a traveling salesman, in a bar, took him to an isolated spot and held him up with a gun. When the victim lunged at Heath's brother, Heath told his brother to shoot him, which Heath's brother did. Heath then stabbed the victim in the neck and tried to cut his throat, but the knife was too dull. Heath then instructed his brother to kill the victim,

and Heath's brother shot the victim twice in the head. The prior violent felony aggravator in this case was based on a prior second-degree murder.

Duncan murdered his fiancee one morning by stabbing her multiple times while she sat on the porch smoking a cigarette. Duncan v. State, 619 So. 2d 279 (Fla. 1993) . Duncan then said, "I did it on purpose," and waited for the police to arrive. Duncan was convicted of first-degree premeditated murder and aggravated assault on the victim's daughter. Duncan later explained that he saw his fiancee leave with two guys the previous night. Like the defendants in Heath and England, discussed above, Duncan had committed a prior murder.

In sum, the cases cited by the state are strikingly dissimilar from the present case: Several involved defendants who had committed prior murders; several involved robbery murders; several involved attacks on more than one person; most involved attacks on strangers; most involved defendants with violent histories and prior incarcerations. The only point of similarity is that some include the prior violent felony aggravator and/or the felony probation/parole/under sentence of imprisonment aggravator. However, even the facts underlying those two aggravators aren't comparable to the facts underlying those aggravators in the present case.

As this Court repeatedly has said, proportionality is not 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)(quotations and citations omitted; emphasis in original). 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 1050 (Fla. 1990), cert, denied, 498 U.S. 110 (1991). The Court must compare "similar defendants, facts, and sentences." Brennan v. State, 754 So. 2d 1, 10 (Fla. 1999).

Unlike any of the cases cited by the state, the present case involved a knee-jerk reaction by a defendant in a highly emotional state, who, as Dr. Krop explained, overreacted because he cared deeply for the victim. Although the state hypothesized that McMillian "laid in wait," planned the murder, then sexually assaulted and killed Ms. Stubbs because she broke up with him, the evidence did not support the state's theory. The jury rejected the sexual assault theory, and there was no evidence of lying in wait or preplanning. Evidence was presented, however, that McMillian has memory deficits, mild to moderate brain damage to the frontal (which results in impaired impulse control) and

temporal lobes, and an IQ of 76 (borderline retarded), some of which explains his overreaction and inability to consider the consequences of his actions in the moment. Based on this evidence, the trial court found McMillian was suffering from mental and emotional distress at the time of the murder. Furthermore, unlike the defendants in the cases cited by the state, McMillian had no prior criminal history other than the fleeing and eluding charge, on which adjudication withheld, and had never been to prison before. Furthermore, McMillian had a stellar work record, a loving family, and no prior difficulties with Ms. Stubbs, with whom he apparently had a loving relationship for eight months. This crime came out of nowhere. Based on the cases cited in his Initial Brief, at pages 71-73, the death sentence is not proportionately warranted.

CONCLUSION

Based on the arguments presented here and in the Initial Brief, appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate appellant's conviction with directions that the conviction be reduced to second-degree murder; Issue 2, vacate appellant's death sentence and reverse for a new sentencing proceeding; Issues 3 & 4, vacate appellant's death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **STEPHEN R. WHITE,** Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and to **JUSTIN RYAN MCMILLIAN,** #133220, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, January 11, 2012.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a) (2), this brief was typed in Courier New 12 point.

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