IN THE SUPREME COURT OF FLORIDA

TERRY SMITH

Appellant,

v. CASE NO. SC11-1076

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Appellant, TERRY SMITH, raises four issues in this appeal from his three convictions for first-degree murder and two sentences to death.

References to the appellant will be to "Smith" or "Appellant". References to the appellee will be to the "State" or "Appellee".

The nineteen volume record on appeal will be referenced as "TR" followed by the appropriate volume number and page number. References to the one supplemental record volume will be referred to as "TR Supp" followed by the appropriate page number. References to Smith's initial brief will be to "IB" followed by the appropriate page number.

STATEMENT OF THE CASE

Terry Smith, born on April 20, 1988, was 19 years old when he murdered Berthum Gibson, Desmond Robinson and Keenethia Keenan on June 5, 2007. (TR Vol. I 2). Robinson was not arrested for the crimes until nearly two years later. (TR Vol. I 1).

On May 21, 2009, a Duval County Grand Jury indicted Smith for three counts of first-degree murder and one count of attempted armed robbery. (TR Vol. I 12). Smith pled not guilty and proceeded to trial on February 28, 2011. Smith's theory at trial was that he was not at the crime scene on the night of the murders and did not shoot the three victims.

At trial, Smith was represented by James Hernandez and Richard Kuritz. At the time of trial, Mr. Hernandez had been a member of the Florida Bar for almost 21 years. Mr. Kuritz had been a member of the Florida Bar for almost 18 years.[1]

The State called 19 witnesses and then rested its case. Smith made a motion for a judgment of acquittal arguing "the State has not established a prima facie case of evidence." (XVI 1308). The trial judge denied the motion. (TR Vol. XVI 1308).

When the defense announced that Smith would not testify, the trial court conducted a colloquy with the defendant. The

[1] www.floridabar.org (find a lawyer link)

court advised him of his right to testify, or not, on his own behalf. (TR Vol. XVI 1310-1311).

The defendant called one witness, Leonard Patterson, and then rested his case. After the defense rested, Smith renewed his motion for a judgment of acquittal without further argument. (TR Vol. XVI 1348). The trial judge denied the motion. (TR Vol. XVI 1348).

On March 4, 2011, contrary to his pleas, a Duval County Jury found Smith guilty as charged. (TR Vol. IV 736-742). By way of a special verdict form, the jury found Smith guilty of both premeditated murder and felony murder for the murders of Berthum Gibson and Keenethia Keenan. (TR Vol. IV 736, 740). The jury found Smith guilty of felony murder for the murder of Desmond Robinson. (TR Vol. IV 738-739). The jury found, as to all charged counts, that Smith actually possessed and discharged a firearm causing death or great bodily harm during the commission of a crime. (TR Vol. IV 736-742).

The penalty phase commenced on March 11, 2011 and lasted one day. The penalty phase can be found in volume eight (VIII) of the trial record.[2] The State presented three victim impact witnesses. Smith presented eleven lay witnesses. (TR Vol. VI 1038).

[2] The index to this volume is based on the page numbers at the upper right hand corner of the pages.

On March 11, 2011, the jury recommended Smith be sentenced to life in prison without the possibility of parole for the murder of Desmond Robinson. (TR Vol. V 879). The jury recommended that Smith be sentenced to death by a vote of 8-4 for the murder of Berthum Gibson. (TR Vol. V 878). The jury recommended that Smith be sentenced to death by a vote of 10-2 for the murder of Keenethia Keenan. (TR Vol. V 880).

On April 15, 2011, the trial court held a Spencer hearing. (TR Vol. VI 1039). The transcript of the Spencer hearing can be found in volume nine (IX) of the trial record. Prior to the Spencer hearing, both sides presented sentencing memoranda to the sentencing judge. (TR Vol. V 929-935; 936-971).

At the Spencer hearing, Brown offered the testimony of two additional witnesses; Christopher Mew and Dr. Stephen Bloomfield. (TR Vol. VI 1039). The State offered additional victim impact statements and the court considered a PSI prepared by the Department of Corrections. (TR Vol. VI 1039).

On May 12, 2011, trial court held a sentencing hearing. A transcript of the sentencing proceedings can be found in volume nine (IX) of the record on appeal.

In accord with the jury's recommendation, the trial judge sentenced Smith to life in prison, without the possibility of parole, for the murder of Desmond Robinson. The Court also followed the jury's recommendations and sentenced Smith to death

for the murders of Berthum Gibson and Keenethia Keenan. (TR Vol. VI 1062).

In aggravation, the Court found the State had proven three aggravators beyond a reasonable doubt: (1) the defendant was previously convicted of a violent felony (great weight); (2) the murder was committed in the course of an attempted robbery (great weight); and (3) the murder was committed for pecuniary gain (merged with 2). (TR Vol. VI 1044-1046).

The trial court found one statutory mitigator to exist; age. The Court gave moderate weight to the defendant's age. (TR Vol. VI 1047-1049).

The Court also considered and weighed numerous non-statutory mitigators: (1) non-statutory mental mitigators (moderate weight); (2) the defendant loves his children and their mothers and they love him (some weight); (3) the defendant is a good brother to his siblings (little weight); (4) the defendant took care of his sister's seven children when she worked at night (moderate weight); (5) the defendant is dependable (some weight); (6) the defendant was a good employee and would, therefore, do well in a structured environment where the Defendant would be required to show deference to authority (slight weight); (7) the defendant exhibited good and mannerly behavior throughout the court proceedings with the jury (no weight); (8) the defendant could be rehabilitated and make

positive contributions to society (little weight); (9) Breon Williams was never charged with a crime (no weight); and (10) the defendant grew up in a terrible neighborhood with a high crime rate and a low graduation rate (some weight). (TR Vol. VI 1050-1060). The trial court found that the aggravating circumstances in this case heavily outweigh the mitigating circumstances. (TR Vol. VI 1061).

On May 31, 2011, Smith filed a notice of appeal. (TR Vol. VI 1067). On March 5, 2012, Smith filed his initial brief. This is the State's answer brief.

SOME KEY PLAYERS AND PLACES

Terry Smith: The defendant and the man who murdered Desmond Robinson, Berthum Gibson and Keenethia Keenan. Smith was 19 years old at the time of the murder and eluded capture for almost two years.

5535 Ahmad Drive: A house where Robinson dealt drugs. The house on Ahmad Drive would be the place that he, and two others, would die on June 5, 2007.

Breon Williams: Breon Williams was present at the house on Ahmad Drive on the night of the murders when Smith attempted to rob its occupants. On the evening of June 5, 2007, Smith called Williams and asked him where he could buy some drugs. Williams invited Smith to ride along to the house on Ahmad Drive so both could buy some drugs. (TR Vol. 628-630). Williams witnessed

some of the murder of Desmond Robinson. Williams testified for the State at trial.

Allegra Muller: Ms. Muller was the sole surviving occupant of 5533 Ahmad Drive on the evening of the murders. Ms. Muller and her best friend Keenethia Keenan had met Berthum Gibson and Desmond Robinson shortly before the murders. Keenan started seeing Gibson after she and Ms. Muller met Robinson and Gibson in a park in Orlando. (TR Vol. XII 595-596). Muller was tired on the night of the murder because she, Keenan, Robinson, and Gibson had recently returned to Jacksonville from Atlanta where they had gone clubbing. (TR Vol. XII 597). Ms. Muller's decision to take a nap saved her life. When the shooting started, Ms. Muller was in a bedroom opposite from the one in which Ms. Keenan would die. When she heard the shooting, Ms. Muller hid in a closet. Once the shooting stopped, Muller fled out of a window and called 911. (TR Vol. XIII 605-609, 613).

Kirk Brewer: Breon Williams enlisted Mr. Brewer to retrieve the scooter that he and Smith used to get to the house on 5533 Ahmad Drive. Williams was so scared when Smith started shooting that he fled the house without stopping to retrieve his scooter. Brewer rode his bike over to Robinson's house to get the scooter from the driveway where Williams had parked it. (TR Vol. XIII 732-733).

Ulysses Johnson: A friend of Terry Smith's. Smith called Johnson to come and pick him up after the murders. Smith told Johnson about the killings. (TR Vol. XIV 854). Smith also told Johnson he was afraid he left his fingerprints at Robinson's house. (TR Vol. XIV 878). After the murder, Ulysses Johnson's brother, Raylan, sold the murder weapon to Walter Dumas.

Raylan Johnson: A good friend of Terry Smith's. Raylan helped Smith hide the murder weapon and get rid of the clothes Smith was wearing when he murdered Robinson, Gibson and Keenan. (TR Vol. XIV 900-901). Days later, Raylan sold the murder weapon to Walter Dumas. (TR Vol. XIV 946). Raylan Johnson was arrested and convicted of three counts of accessory after the fact to murder. (TR Vol. XVI 1305).

STATEMENT OF THE FACTS

On June 5, 2007, the defendant murdered Desmond Robinson, Berthum Gibson and Keenethia Keenan. The evidence at trial demonstrated that on the evening of June 5, 2007, Smith called Breon Williams on the phone.

Williams was a street level drug dealer. He would buy drugs and then sell them to others. (TR Vol. XIII 627). One of the persons from whom Williams bought drugs from was Desmond Robinson. (TR Vol. XIII 626).

During the phone call, Smith told Williams that he was trying to find some drugs to buy. (TR Vol. XIII 628). Williams

told Smith that he knew where they could get some and invited Smith to accompany him to 5533 Ahmad Drive in Jacksonville, Florida.

Williams owned a little black scooter. Williams picked up Smith on the scooter and, together, they rode over to Robinson's house on Ahmad Drive. (TR Vol. XIII 629). When the pair arrived at 5533 Ahmad Drive, Williams parked the scooter in the driveway and the two men walked to the rear of the house. (TR Vol. XIII 630).

Smith and Williams went up to the back door and knocked. Robinson was not expecting Williams because Williams had not called ahead. (TR Vol. XIII 631). Robinson opened the back door and both men went into the house. Williams told the jury that Berthum Gibson and a girl he did not know were at the dining room table. Gibson was sitting in a chair and the girl was on Gibson's lap. Cocaine was on the table. (TR Vol. XIII 634-636).

Since Williams was there to buy drugs, Williams walked over into the kitchen (adjacent to the dining room) by the sink to count out his money. Smith was also in the kitchen, standing by the refrigerator. The refrigerator is right by the back door. (TR Vol. XIII 637).

As Williams was counting his money, Williams heard Smith tell Robinson to "give it up." Immediately, Williams heard

gunshots. (TR Vol. XIII 638). Williams headed for the back door. Williams had to stop to unlock the back door with a key that was in the door because Robinson had locked it after Smith and Williams had come inside. (TR Vol. XIII 640). As Williams was leaving, he saw Smith shoot Robinson. Williams told the jury that Smith just raised the gun and started shooting. Williams saw Robinson fall. (TR Vol. XIII 640).

Robinson died from seven gunshot wounds. One of the wounds was a gunshot to the back of Robinson's head. (TR Vol. XII 832). Most of the other bullet wounds were to the back of Robinson's body. (TR Vol. XIV 834). Injuries to Robinson's face were consistent with a conclusion that Robinson was dead before he hit the floor.

As Williams fled, he could still hear gunfire in the house. (TR Vol. XIII 641). Williams did not see what happened to Berthum Gibson or Keenethia Keenan. Williams left in such a hurry he left his money on the counter and his scooter parked in the driveway. (TR Vol. XIII 641-642).[3]

[3] Williams enlisted the help of a Kirk Brewer to go and retrieve the scooter. Of course, Williams did not tell Brewer of the murder he had just witnessed or the gunfire he had heard inside the house as he left. Brewer rode his bicycle over to Ahamad drive and retrieved the scooter. The police found his bicycle hidden just where he left it, in the bushes across from Robinson's home. (TR Vol. XIII 732,799). Anthony Nelson saw Brewer ride his bicycle up to the house on Ahmad Drive, park his bicycle across the road and retrieve the scooter. (TR Vol. XIII 725). Nelson also heard the gunfire and saw Ms. Muller fleeing

After Smith killed Robinson, he stepped over Desmond Robinson's body and into the living room. (State's Exhibit 1).[4] From there, Smith shot both Berthum Gibson and Keenethia Keenan. Gibson died from a single gunshot wound to the abdomen. Keenan died from a single gunshot wound to the chest. (TR Vol. XIV 837-842).

Smith did not kill everyone in the house. One person survived.

Allegra Muller was taking a nap when, all of a sudden, she heard a lot of shooting. (TR Vol. XIII 607). She hid in the closet. To her, the gunfire seemed to go on forever. (TR Vol. XIII 607). After the shooting stopped, Ms. Muller climbed out of the bedroom window and down to the ground below. Ms. Muller was able to use her cell phone to call 911. (TR Vol. XIII 613).

When the police arrived at 5533 Ahmad Drive, they found the backdoor open. Desmond Robinson was lying on the kitchen floor. (TR Vol. XII 587).[5] Robinson had a Glock 9mm handgun in this hand. The weapon was loaded. A round was in the chamber and the extended magazine was full. (TR Vol. XIII 787, 813). The

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from a window. He did nothing to help her and did not call the police. (TR Vol. XIII 726-727).

[4] This Court has State's Exhibit 1 in this Court's record. It is a large poster board depicting the layout of the house on 5535 Ahmad Drive.

[5] State's Exhibit 1 shows that the kitchen and dining area are both fairly small and right next to each other. Some might call the "dining room" the eat-in kitchen.

police found no nine millimeter casings in the house. The fully loaded weapon and the absence of casings meant that Robinson never got a shot off as Smith gunned him down.

Berthum Gibson was found in the back bedroom. He was on his knees leaning against the bed as if in prayer. He had a long gun (AK 47) in his hand. One of the officers took the gun out of Gibson's hand and laid it on the bed. Gibson was still alive. (TR Vol. XII 590). Paramedics transported Gibson to the hospital where he later died.

In the same bedroom, police also found the body of Keenethia Keenan. She was dead. (TR Vol. XII 590).

There was evidence of gun fire up and down the hall. Police found twenty-four shell casings in the house. Thirteen of them, 7.62 millimeters, were fired from the weapon found in Gibson's hand. Detective Kicklighter, the lead crime scene investigator, told the jury that the 7.62 shell casings were found in the back bedroom, where Gibson and Keenan were found, and in the hallway leading to the back bedroom. (TR Vol. XIII 797).

The remaining eleven shell cases were 10 millimeter (mm) shell casings. Police did not find a 10mm at the murder scene. None of the 10mm shell casings were found in the bedroom where Gibson and Keenan were found. Nor were any 10mm shell casings found in the hallway leading to the bedroom. All of the 10mm

shell casings were found either in the kitchen, where Smith shot Robinson, or in the living room. (TR Vol. XIII 796).

Smith told several people about the killings after the murder. Smith called Ulysses Johnson after the murders and asked Johnson to pick him up not far from Ahmad Drive. (TR Vol. XIV 849-850). Johnson, along with Jonathan Peterson and Raylan Johnson, drove over to pick Smith up. (TR Vol. XIV 849). Smith told Johnson and Peterson that he shot three people. Smith told Johnson that the first dude came and he shot him and then he shot the other people in the house. Smith told Johnson that he heard somebody else shooting in the back and he ran. (TR Vol. XIV 855).

Smith told Jonathan Peterson that he shot Desmond Robinson in the kitchen. He proceeded through the house and shot a second man named Bert in the living room area. Smith told Peterson that "somebody else" came through the hallway returning fire. Smith told Peterson that they exchanged shots. Smith told Peterson that he "possibly shot the third person." (TR Vol. XIV 902).

Peterson knew Smith owned a 10mm pistol. He had seen Smith with the gun before the murders. Smith gave the murder weapon to Raylan Johnson. Raylan Johnson sold it to Walter Dumas. (TR Vol. 903, 946). Dumas told the jury that he let a friend borrow

the 10mm but he never returned it. The gun was never recovered. (TR Vol. XIV 948-949).

Smith also told Edward Haney that he had killed three people. (TR Vol. XIV 1026). Smith told Haney that he shot a dude named Desmond, a dude named Bert, and a girl. (TR Vol. XV 1026). Smith told Haney that he had gone to the house on Ahmad Drive with a dude named Breon. Smith told him he used a 10mm in the killings. (TR Vol. XV 1028).

Eventually, police arrested Smith for the murders of Robinson, Gibson, and Keenan. Smith denied ever being at the house on Ahmad Drive. He also denied any involvement in the killing. (TR Vol. XV 1115, 1155). The forensic evidence contradicted Smith's claim that he had never been to the house on Ahmad Drive. Smith's palm print was found on an interior plexiglass panel from the back door of the house on Ahmad Drive. (TR Vol. XV 1056-1057).[6]

SUMMARY OF THE ARGUMENT

ISSUE 1: In this claim, Smith alleges the trial judge erred in denying his motion for a judgment of acquittal for the premeditated murder of Berthum Gibson and Keenethia Keenan. Smith is mistaken. The evidence showed that Smith entered the

[6] The State generally accepts the testimony at the penalty phase and at the Spencer hearing as set forth by Smith. The State does not accept the conclusions that Smith reaches from the facts recited in his initial brief.

victims' home armed with a Glock 20 ten mm pistol. Almost immediately, Smith pulled the gun and told Desmond Robinson to "give it up". Smith immediately started shooting. Smith shot Desmond Robinson seven times, mostly in the back. He then stepped over Robinson's body and into the living room where he shot Bethum Gibson and Keenethia Keenan as they retreated down the hallway to the back bedroom. There was competent substantial evidence to support the jury's verdict of guilt for the premeditated murder of Gibson and Keenan.

ISSUE 2: In this claim, Smith avers the trial court erred in giving additional weight to the "in the course of a felony aggravator" because the murders were premeditated. The weight given to aggravators and mitigators is a matter within the trial court's discretion. The trial court did not abuse its discretion in considering all of the circumstances surrounding the attempted robbery and the murders of Berthum Gibson and Keenethia Keenan when assigning weight to the "in the course of an enumerated felony" aggravator.

ISSUE 3: In this claim, Smith alleges his sentences to death are disproportionate. Several cases from this Court demonstrate that death is a proportionate sentence in this case.

ISSUE 4: In his final claim, Smith alleges his sentences to death violate the dictates of Ring v. Arizona. Ring is satisfied, in any event, in this case as Smith was previously

convicted of a prior violent felony (contemporaneous murders of the other victims). Moreover, Smith committed the murder in the course of an attempted armed robbery. This Court has consistently ruled that a death sentence does not violate Ring when the defendant has previously been convicted of a violent felony or commits the murder in the course of an enumerated felony.

ARGUMENT

ISSUE I

WHETHER THE TRIAL JUDGE ERRED IN DENYING SMITH'S MOTION FOR A JUDGMENT OF ACQUITTAL FOR PREMEDITATED MURDER

In this claim, Smith avers the trial judge erred in denying the defendant's motion for a judgment of acquittal for premeditated murder.[7] The standard of review is *de novo*.

A trial court's determination of the sufficiency of evidence to prove premeditation is guided by five principles. First, premeditation is a factual issue for the jury. Second, if the evidence of premeditation is direct, whether in whole or in part, a jury's finding of premeditation will be sustained if, when viewing the evidence in the light most favorable to the state the finding is supported by competent, substantial evidence in the record. Third, where the evidence of premeditation is wholly circumstantial, the evidence must be

[7] Smith does not challenge the sufficiency of the evidence for the jury's finding of felony murder.

both sufficient to support the finding of premeditation and, when viewed in the light most favorable to the State, must also be inconsistent with any reasonable hypothesis of innocence. Heyne v. State, --- So.3d ----, 2012 WL 1345357 (Fla. 2012).[8] Fourth, once the state presents evidence that is inconsistent with the defendant's hypothesis of innocence, it is up to the jury to resolve the inconsistencies. The jury is not required to believe the defendant's version of the facts when the State has produced evidence inconsistent with the defendant's reasonable hypothesis of innocence. Perry v. State, 801 So.2d

[8] In reviewing the sufficiency of the evidence and applying the circumstantial evidence standard, this Court has ruled that the State is obligated to present evidence inconsistent with any reasonable inference other than guilt. *See e.g.* Heyne v. State, --- So.3d ----, 2012 WL 1345357 (Fla. 2012). This Court should make clear the State should only be required to offer evidence inconsistent with any reasonable hypothesis of innocence that the defendant actually offers at trial. Requiring the State to rebut all reasonable inferences invites scenarios such as the one here. At trial, Smith's defense is "I was not there, and I did not do it." The State in answer offered ample evidence Smith was there and was the lone shooter. Premeditation was not really in dispute. On appeal, Smith's hypothesis of innocence is "Oh yeah, I did it but it was not premeditated." Requiring the State to offer evidence to rebut hypotheses of innocence not offered at trial makes this Court, rather than the jury, the one who ultimately resolves the inconsistency between the defendant's theory and the State's evidence. Additionally, such a standard makes determining whether there is competent substantial evidence to support the jury's resolution of inconsistencies between the defendant's version of events and the State's evidence really an academic exercise. It is axiomatic that this Court cannot really review a jury's resolution of inconsistencies between the defendant's version of events and the state's evidence when the defendant's version of events is different on appeal.

78, 84 (Fla. 2001). As long as the jury's resolution of the inconsistency in favor of the State is supported by competent, substantial evidence, this Court will affirm. Twilegar v. State, 42 So.3d 177 (Fla. 2010). Finally, premeditation is more than a mere intent to kill; it is a fully formed conscious purpose to kill. Premeditation may be formed in a moment before the act. All that is required is that there is a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act. Evidence from which premeditation may be inferred includes such matters as 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. Twilegar v. State, 42 So.3d 177, 190 (Fla. 2010).

This Court should deny this claim for two reasons. First, the claim is not preserved for appeal. At the close of the State's case, Smith made a barebones motion for a judgment of acquittal. The only argument to support the motion was "the State has not established a prima facie case of evidence." (TR Vol. XVI 1308). The trial judge denied the motion. (TR Vol. XVI 1308). At the close of the defendant's case, Smith renewed his motion without further argument. (TR Vol. XVI 1348). Smith's renewed motion for acquittal was denied. (TR Vol. XVI

1348). Such a barebones motion for a judgment of acquittal, in which Smith did not make any of the same arguments he makes before this Court, is insufficient to preserve this claim for appeal. Victorino v. State, 23 So.3d 87 (Fla. 2009)(boilerplate motion for a judgment of acquittal which does not present the grounds the defendant now raises on appeal does not preserve the issue for appellate review).

This claim may also be denied on the merits. Even assuming the circumstantial evidence standard of review applies, the State presented evidence inconsistent with any reasonable hypothesis of innocence. Moreover, competent substantial evidence supports the jury's finding the murders were premeditated.

Although Smith did not present this same hypothesis of innocence below, Smith avers now that his reasonable hypothesis of innocence is that after he shot Robinson seven times, Gibson and/or Keenan grabbed a single rifle from somewhere in the house and fired at Smith. Thereafter, a gun battle ensued and, according to Smith, it could be that he simply fired back and he was the better shot. (IB 42-43).

In claiming the State did not present evidence inconsistent with this "gun battle" theory of innocence, Smith ignores two key pieces of evidence. First, State's Exhibit 1 as well as State's Exhibit 22, demonstrates that in order to shoot Gibson

and Keenan, Smith had to step over the body of Desmond Robinson and into the living room. (TR Vol. IV 608).[9] After shooting Robinson, Smith could have easily left the house through the back door that was immediately behind him. (TR Vol. IV 610). He didn't. Instead, Smith stepped over Robinson's body into the living room where he fired the fatal shots that killed Gibson and Keenan.

The second piece of evidence is the location of the shell casings. Smith carried and used a 10mm handgun (Glock 20) to the murder scene. All of the 10mm shell casings were found in the kitchen/dining room area and the living room. (TR Vol. XIII 796).

In contrast, with one exception, shell casings fired from the long gun that responding officers found in Berthum Gibson's hand (7.62 mm) were found in the bedroom and in the hallway leading to the bedroom. (TR Vol. XIII 788, 797).[10] Accordingly, it is clear that Gibson did not start a gun battle by firing at Smith immediately after Smith killed Robinson. Instead, the

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[9] State's Exhibit 1 depicts the position of Robinson's body as well as the body of Keenethia Keenan.

[10] Police officers responding to the murder scene found Berthum Gibson and Keenethia Keenan in the back bedroom. Gibson was on his knees as if praying and leaning on the bed. Gibson had a long gun (SKS or AK 47) in his hand as he kneeled by the bed. One of the officers took the weapon from Gibson's hands. (TR Vol. XII 589-590). No weapon was found around or on Ms. Keenan. (TR Vol. IV 611). Paramedics transported Gibson out of the house before the crime scene techs arrived.

location of the 7.62 shell casings show that after Smith shot Desmond Robinson, Gibson and Keenan must have retreated from the dining room table, at which they were seated when Smith arrived, at least part way down the hallway and in the direction of the back bedroom. While it is true the evidence supports a conclusion that, from somewhere in the house, Gibson retrieved a rifle to defend himself and Keenan, the evidence shows that Smith stepped over Robinson and into the living room to pursue the retreating pair. From there, Smith shot both of them center mass. (TR Vol. XIV 837-840).

Smith's step over Robinson's dead body into the living room to pursue the retreating Gibson and Keenan is evidence inconsistent with Smith's hypothesis, now, that he reflexively returned fire as he was being fired upon. As the State introduced evidence inconsistent with Smith's hypothesis and consistent with premeditation, the jury's verdict is supported by competent substantial evidence.

In his initial brief, Smith cites to several cases which he alleges supports the notion there was insufficient evidence to support the jury's finding the murders were premeditated. All of the cases are distinguishable.

In Mungin v. State, 689 So.2d 1026 (Fla. 1997), Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head. This Court found the trial court erred in denying

Mungin's motion for a judgment of acquittal as to premeditation. This Court observed that the State presented evidence of premeditation, such as that the victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. On the other hand, this Court found that the evidence was also consistent with a killing that occurred on the spur of the moment. For instance, this Court observed that there were no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation. Accordingly, the Court found the trial judge erred in denying the motion for a judgment of acquittal as to premeditation. Mungin v. State, 689 So.2d at 1029.

Mungin is distinguishable for two reasons. First, the decision in Mungin appears to be contrary to this Court's jurisprudence today. In Mungin, this Court acknowledged that the State presented competent substantial evidence the murder was premeditated; such as the single gunshot wound to the head (execution style) and the advance procurement of the weapon. Accordingly, in accord with this Court's decisions such Twilegar v. State, 42 So.3d 177, 190 (Fla. 2011) and Heyne v. State, --- So.3d ----, 2012 WL 1345357 (Fla. 2012), it was the jury's

responsibility to resolve the inconsistent theories. As competent substantial evidence supported the jury's resolution in the State's favor in Mungin, this Court should, if deciding the case today, affirm. Heyne v. State, --- So.3d ----, 2012 WL 1345357 (Fla. 2012); Twilegar v. State, 42 So.3d 177, 190 (Fla. 2010).

Mungin is also distinguishable because, in Mungin, this Court noted there was no evidence that Mungin continued the attack on the single victim. In this case, the evidence supported a finding that after killing Robinson, Smith stepped over Robinson's dead body to pursue the retreating Gibson and Keenan and then shot them to death. Mungin is not a case to which this Court should look to resolve this issue.

Smith also cites to Terry v. State, 668 So.2d 954 (Fla. 1996). In Terry, the defendant shot the victim inside the office of a Mobile gas station in Daytona Beach that Terry and his co-defendant intended to rob. Terry's co-defendant held Mr. Franco at gunpoint while Terry went into the office with Ms. Franco. Shortly thereafter, Mr. Franco heard a scream and thirty seconds later a shot. Terry ran out of the office as Ms. Franco lay dead on the office floor. This Court found there was insufficient evidence of premeditation because there was no evidence of how the shooting occurred. Terry v. State, 668 So. 2d at 964.

Terry is distinguishable because in Terry, this Court found there was no evidence how the shooting occurred. That is not the case here. The evidence showed that Smith first shot Desmond Robinson seven times, stepped over his body and into the living room and fired two bullets, center mass, into Berthum Gibson and Keenethia Keenan. Terry is not a case to which this Court should look to resolve this issue.

Finally, Smith cites to Jackson v. State, 575 So.2d 181 (Fla. 1991). In Jackson, the victim was found face down behind the counter of a hardware store, semiconscious, and clutching a five-dollar bill in one of his hands. The cash register drawer was open. Coins lay scattered about on the floor and the register contained only a single one-dollar bill. The victim had been shot once in the lower right chest from a distance of at least three feet. There were no witnesses to the shooting, and the victim was unable to describe what happened before he died. At trial, the State presented evidence that Jackson told his mother he killed the victim because he "bucked the jack."

This Court found there was insufficient evidence to support premeditation because there was no evidence to indicate the murder of the victim was an anticipated killing, and where all of the evidence was equally and reasonably consistent with the theory that the victim resisted the robbery, inducing the gunman to fire a single shot "reflexively". This Court also noted that

there was no evidence it was actually Jackson (as opposed to the co-defendant) who actually fired the fatal shot. Jackson v. State, 575 So. at 186.

Unlike Jackson, evidence of Smith's actions in failing to leave the house after killing Desmond Robinson and in stepping over Robinson's body to pursue Gibson and Keenan and shoot them to death, provides competent, substantial evidence to support the jury's resolution of the issue of premeditation in the State's favor. Jackson is not a case to which this Court should look to resolve this issue.

On this record, there was competent substantial evidence to support the jury's resolution of the issue of premeditation in favor of the State. Accordingly, this Court should reject Smith's first claim on appeal. Asay v. State, 580 So.2d 610 (Fla. 1990).

ISSUE II

WHETHER THE TRIAL JUDGE ERRED IN ASSIGNING ADDITIONAL WEIGHT TO THE FELONY MURDER AGGRAVATING CIRCUMSTANCE ON THE BASIS THE MURDERS WERE PREMEDITATED[11]

In this claim, Smith alleges the trial judge erred in assigning additional weight to the "murder in the course of an enumerated felony" aggravator on the grounds the murders were

[11] The only remedy for this claim is a remand to the sentencing judge for re-weighing of the aggravator without regard for the defendant's state of mind at the time of the murders and resentencing. Smith agrees. (IB 52).

premeditated. Smith does not contest the sufficiency of the evidence to support the "murder in the course of an enumerated felony" aggravator. Instead, Smith argues only that the trial court impermissibly gave the aggravator more weight because the murders were premeditated.

The standard of review is an abuse of discretion. Sexton v. State, 775 So.2d 923, 934 (Fla. 2000)(the weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard). In order to find an abuse of discretion, this Court must find that no reasonable person would take the view adopted by the trial judge. As long as the weight accorded an aggravator is supported by competent, substantial evidence, this Court will find no abuse of discretion. Sexton v. State, 775 So.2d at 934. *See also* Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006).

In Smith's case, the trial judge found that the "murder in the course of an enumerated felony" had been proven and gave it great weight. (TR Vol. VI 1046). In assigning the aggravator great weight, the trial court found:

> In cases where premeditation is present, such as is the case for the deaths of Berthum Gibson and Keenethia Keenan, the weight given to this aggravating circumstance should be greater. In the case, *sub judice*, as to Counts One and Three, the jury made a special finding that the killing was premeditated. The Court independently makes this finding as well. Rather than exiting through the door of the residence immediately behind Defendant after he murdered Desmond

> Robinson, the Defendant stepped over the dead body of Desmond Robinson and walked to the opposite end of the house to hunt down and murder Berthum Gibson and Keenethia Keenan. The path of travel and location of the wounds suffered by Berthum Gibson and Keenethia Keenan reveal the Defendant's premeditated intention. Indeed, Ms. Keenan was unarmed at the time she was shot.
>
> This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case as to Counts One and Three.

(TR Vol. VI 1046).

Before this Court, Smith's argument is three-fold. First, Smith alleges the trial judge's consideration of the nature of the murders committed in the course of an attempted armed robbery, including the defendant's state of mind, is impermissible. Smith alleges the trial judge, by considering the defendant's state of mind, impermissibly injected non-statutory aggravation into the weighing process. (IB 51).[12] Smith argues that similar to consideration of a prior violent felony, a trial court should only be allowed to consider the

[12] In support of his argument Smith cites to Brown v. State, 381 So.2d 690 (Fla. 1980). (IB 51). Smith claims in Brown, this Court ruled that it was improper for the court to consider premeditation as an aggravating factor. (IB 51). However, in Brown, the trial court actually considered the murder was premeditated as a separate aggravating factor. In this case, the Court did not consider Smith's premeditated killing of Berthum Gibson and Keenethia Keenan as an aggravating factor. Instead, the trial court considered the facts of the murders, including that Smith could have retreated through an open door, but did not and instead stepped over the body of the first victim he shot to death to shoot two others who attempted unsuccessfully to retreat to the back of the house.

circumstances of the underlying felony, not the circumstances of the murders committed in the course of that underlying felony. (IB 52).

Second, Smith claims that facts "completely unrelated" to the underlying felony cannot be considered. Without really explaining why this is so, Smith avers the nature of the murders committed during the attempted robbery is "completely unrelated" to the "murder in the course of an enumerated felony" aggravator.

Finally, Smith argues that, even if the judge could properly consider the fact the defendant committed two premeditated murders in the course of an attempted robbery, he could not do so in this case. Smith claims, as he did in Claim I, that there was insufficient evidence that Smith premeditated the murders of Gibson and Keenan. Accordingly, Smith avers there is not competent substantial evidence to support the trial court's decision to afford great weight to the "in the course of an enumerated felony" aggravator.

This Court should reject Smith's second claim on appeal. This is so for two reasons.

First, neither law nor logic support Smith's claim the facts surrounding a murder(s) committed in the course of an enumerated felony, including the defendant's state of mind, may not be considered when assigning weight to the aggravator. Nor

does law or logic support Smith's argument that the circumstances of the murders are unrelated to the "murder in the course of an enumerated felony" aggravator. Indeed, consideration of the facts and circumstances of a murder, or in this case three murders, committed in the course of an enumerated felony is exactly what is appropriate, even necessary, when assigning weight to this, or any, aggravator. *See e.g.* Frances v. State, 970 So.2d 806, 817 (Fla. 2007) (distinguishing cases in which this Court held that a prior violent felony aggravating factor should be accorded less weight based on the circumstances surrounding the prior convictions and finding no abuse of discretion in giving great weight to the prior violent felony aggravator when the defendant strangled two women in order to steal a car and other items to pawn for cash).

In this case, the trial court properly considered the fact the defendant, rather than exiting through the door that was immediately behind him, intentionally stepped over the body of his first victim to hunt down and murder two more victims. The trial court also properly considered that Ms. Keenan was unarmed at the time she was shot. Indeed, such considerations are exactly those necessary to distinguish those attempted robberies, commonly referred to by this Court as "a robbery gone bad" where a trial judge may choose to give less weight to this particular aggravator, from more aggravated felonies, such as

this one, in which the defendant intentionally escalated the violence during the course of an attempted robbery. A trial judge commits no error in considering all relevant factors, including the defendant's deliberate escalation of the violence, in weighing the "murder in the course of an enumerated felony" aggravator.

Even if the trial judge should not have considered the defendant's "premeditation" in weighing the aggravator, any error is harmless. This is so because the trial court could have properly considered, and indeed did consider, all of the facts surrounding the murders committed in the course of the attempted robbery. This would include the defendant's deliberate decision to escalate the violence to murder two more people once he murdered Desmond Robinson.

Any error is also harmless because the trial judge found that it was the contemporaneous murders that tipped the scale to the "harshest of sentences." (TR Vol. VI 1061). Smith does not challenge either the sufficiency of that aggravator or the weight the trial court assigned to the aggravator. Moreover, the trial judge made clear, in his sentencing order, that not only was he required to give the jury's recommendations for death great weight but that he "wholly agree[d]" with the jury's recommendations based on his assessment of the aggravating and mitigating circumstances presented. (TR Vol. VI 1061).

Accordingly, any error in considering the defendant's state of mind was harmless.

The second reason this Court should reject Smith's second claim on appeal is that, contrary to his argument, there was sufficient evidence to support the jury's and the trial judge's finding the murders were premeditated. As discussed above in the State's answer to Smith's first claim on appeal, the evidence introduced at trial demonstrate that Smith brought a weapon to the murder scene. Smith was standing between Robinson and the back door. (TR Vol. XIII 636-637). Almost immediately after entering the victim's house, Smith pulled a weapon and attempted to rob Desmond Robinson. Once Smith had dispatched Robinson with seven gunshot wounds; almost all of which were in the back, including one to the back of the head, the evidence shows that Smith did not retreat from the house through the nearby back door. Instead, Smith stepped over Robinson's dead body and proceeded to the hallway to dispatch both Gibson and Keenan with one gunshot, each, to center mass. (State's Exhibit 1; TR Vol. XIII 837-840). Although the evidence establishes that at some point, Gibson had an AK-47 and fired it from the hallway and back bedroom, Keenan was unarmed. Smith's decision to step over the body of Desmond Robinson and pursue Gibson and Smith to shoot them both with one gunshot center mass is

sufficient to support the jury's verdict. This Court should deny Smith's second claim on appeal.

ISSUE III

WHETHER SMITH'S SENTENCES TO DEATH IS PROPORTIONATE

In this claim, Smith claims his sentences to death are disproportionate. In sentencing Smith to death for the murders of Berthum Gibson and Keenethia Keenan, the trial judge found two aggravators had been proven beyond a reasonable doubt: (1) the murders were committed in the course of an attempted robbery/pecuniary gain (merged), and (2) the defendant had previously been convicted of a violent felony (the contemporaneous murders of the other two victims). The trial court afforded both of these aggravators great weight. (TR Vol. VI 1044-1046).

The trial court found one statutory mitigator; the age of the defendant. The trial court gave moderate weight to this mitigator. (TR Vol. VI 1049). Neither statutory mental mitigator was found. (TR Vol. VI 1049-1050).

The trial court also found and weighed several non-statutory mitigators: (1) non-statutory mental mitigators (moderate weight); (2) Smith loves his children and their mothers and they love him (some weight); (3) Smith is a good brother to his siblings (little weight); (4) Smith took care of his sister's seven children when she worked at night (moderate

weight); (5) Smith is dependable (some weight); (6) Smith is a good employee and would do well in a structured environment where he would be required to show deference to authority (slight weight); (8) Smith could be rehabilitated and make positive contributions to society (little weight); and (9) Smith grew up in a "terrible" neighborhood with a high crime rate and low graduation rate (some weight). (TR Vol. VI 1037-1063). The court considered, but rejected, two suggested non-statutory mitigators: (1) the defendant exhibited good and mannerly behavior throughout the Court proceedings with the jury; and (2) Breon Williams was never charged with a crime. (TR Vol. VI 1057-1058).

Smith does not point to any cases that actually support his claim his sentences to death are disproportionate. With only one exception, Smith cites only to single aggravator cases in which this Court reduced the defendant's death sentence to life.[13] Smith's case, however, is not a single aggravator case.

[13] In the two aggravator case, Larkins v. State, 739 So.2d 90 (Fla. 1999), this Court found Larkins' sentence to death disproportionate when his prior violent felonies had been committed 20 years before the murder and Larkins had led a crime free life in the interim. Moreover, unlike the case here, Larkins had a long history of mental and emotional problems and significant brain damage affecting both hemispheres of his brain. In reducing Larkins' sentence on proportionality grounds, this Court noted the murder "appeared to have resulted from impulsive actions of a man with a history of mental illness who was easily disturbed by outside forces." Larkins, 739 So.2d at 95.

Indeed, Smith does not even challenge the sufficiency of the evidence to support both aggravators. Additionally, this Court has recognized that one of the two aggravators found in this case, the contemporaneous murder of other victims is significantly weighty. McCray v. State, 71 So.3d 848 (Fla. 2011)(citing to Deparvine v. State, 995 So.2d 351, 382 (Fla. 2008) and noting that this Court has previously stated that, qualitatively, the prior violent felony aggravator, which rests on the contemporaneous murder convictions in this case, "is among the most serious and weighty."). *See also* Mosley v. State, 46 So.3d 510, 528 (Fla. 2009).

Although Smith does not offer any comparator cases, there are several cases to which this Court may look in conducting its proportionality review. In Bevel v. State, 983 So.2d 505 (Fla. 2008), the defendant, who was 22 years old at the time of the murders, shot and killed two people and attempted to kill another. The trial court found one aggravator to exist for both murders; prior violent felony. The trial court found one additional aggravator as to the second victim; avoid arrest. The trial court found no statutory mitigation to exist but found in non-statutory mitigation that: (1) the defendant has religious faith and loves his family members (minimal weight); (2) defendant confessed to the crime (little weight); (3) defendant has exhibited good behavior in jail (very little

weight); (4) defendant exhibited good behavior in court (little weight); (5) defendant has an IQ of 65 (little weight); and (6) defendant struggled with the death of his mother (very little weight). Bevel v. State, 983 So.2d at 513 n.4.

This Court found Bevel's sentence to death for both murders proportionate. While the aggravation and mitigation in this case is not identical to that found in Bevel, it is sufficiently similar for this Court to look to its decision in Bevel to find Smith's sentences to death proportionate. For instance, while the trial court in Bevel did not find the age mitigator as did the trial court in Smith's case, the trial court in this case only gave the age mitigator moderate weight. In doing so, the trial judge rejected any notion that Smith's age was linked to the crime. The trial judge also noted, and found persuasive, testimony from numerous witnesses who testified to instances of conduct which demonstrated Smith's "maturity and responsibility". (TR Vol. VI 1048).

Bevel's and Smith's non-statutory mitigation are similar. Both have relatively low IQ's but Bevel's IQ is 11 points lower. (TR Vol. VI 1050). In neither case, did the court find that either statutory mental mitigator applied. Nor did the trial courts in either case find any brain damage, mental illness, child abuse, or sexual abuse. This Court can look to its

decision in Bevel to find Smith's sentences to death proportionate.

In Hayward v. State, 24 So.3d 17 (Fla. 2009), the defendant shot a paper delivery man to death. The victim was robbed and shot while filling up a newsstand at a convenience store in the early morning hours of February 1, 2005.

In aggravation, the trial court found three aggravators to exist: (1) prior violent felony (based on previous convictions for second-degree murder and two counts of armed robbery); (2) murder in the course of a robbery and (3) pecuniary gain. As did the trial court in this case, the trial judge in Hayward merged the 2d and 3d aggravator. The trial court found no statutory mitigators but found eight non-statutory mitigators to exist: (1) Hayward could have received a life sentence; (2) Hayward grew up without a father; (3) Hayward was loved by his family; (4) Hayward had academic problems; (5) Hayward obtained a GED in prison; (6) Hayward would make a good adjustment to prison; (7) Hayward had financial stress at the time of the crime; and (8) Hayward had some capacity for rehabilitation.

On appeal, Hayward did not raise a claim his sentence to death was disproportionate. Nonetheless, as in every capital case, this Court considered whether Hayward's sentence to death was proportionate. This Court concluded that it was. Hayward v. State, 24 So.3d at 46-47.

The aggravators found in this case were nearly identical. In both cases the trial court found a prior violent felony and that the defendant committed the murder in the course of a robbery. Although Hayward had previously committed other violent felonies including a second degree murder, Smith killed three people at one time. Additionally, both committed their murders in the course of an enumerated felony.

Likewise, the mitigation is similar. In both cases, the trial judge found no statutory mental mitigation, no brain damage, no major mental illness, no child abuse or no sexual abuse. This Court may look to Hayward to determine Smith's sentences to death are proportionate.

In Miller v. State, 770 So.2d 1144 (Fla. 2000), the defendant murdered one victim and beat up another. Although the defendant did not shoot his murder victim, Miller hit the victim with a pipe with sufficient force to immediately cause unconsciousness or death. Similar to Keenethia Keenan, Miller's victim died very quickly.

In support of the death sentence, the trial court found the following aggravating circumstances: (1) prior violent felony conviction (prior murder); and (2) the homicide was committed during an attempted robbery and for pecuniary gain (merged). The trial court did not find any statutory mitigators, but found the following nonstatutory factors: (1) the victim was rendered

unconscious immediately and did not suffer-very little weight; (2) the alternate sentence for murder is life without possible release-very little weight; (3) the defendant turned himself in-slight weight; (4) the defendant exhibited remorse and apologized to the victim's family-some weight; (5) the defendant did not resist and cooperated with the police investigation-some weight; (6) the defendant suffered emotional distress over the death of his sister and a close cousin-little weight; (7) the defendant has a frontal lobe deficiency that affects inhibition and impulse control-modest weight; (8) the defendant would likely adapt well to long-term incarceration-very little weight; (9) the defendant was loved by his family and had performed good deeds-slight weight; and (10) the defendant had adjusted well while incarcerated-slight weight. Miller v. State, 770 So.2d at 1146, n.1.

In this case, the aggravation is similar to that in Miller's case. While Miller had previously been convicted of murder in North Carolina, Miller murdered one victim for which he was sentenced to death. Smith committed three murders, including one unarmed woman who was simply in the wrong place at the wrong time.

Additionally, the mitigation found to exist is similar. In particular, no statutory mental mitigators were found in either case. While in Miller, the trial court found brain damage, no

brain damage was found here. Likewise in both cases, the non-statutory mitigation was far from compelling. This Court can look to Miller to find Smith's sentences to death proportionate.

In Lebron v. State, 982 So.2d 649 (Fla. 2008), the defendant shot Larry Neil Oliver to death in the course of a robbery. The trial court found that the State had proven beyond a reasonable doubt that: (1) Lebron was previously convicted of a felony that involved the use or threat of violence to a person; (2) the capital felony was committed while Lebron was engaged in or an accomplice in the commission of robbery; and (3) the murder was committed for financial gain. The trial court merged the second and third aggravators.

The trial court further found that there were no statutory mitigators present. The trial court found the following nonstatutory mitigators: (1) Lebron's mother used drugs (assigned "very little weight"); (2) Lebron performed poorly in school ("some weight"); (3) Lebron was good with children ("very little weight"); (4) the profile of Lebron's parents was mitigating ("very little weight"); (5) Lebron's mother rejected him and had negative feelings about him ("some weight"); (6) Lebron behaved properly during trial ("very little weight"); and (7) Lebron had emotional problems, mental health problems, and lacked the "world's best mother" ("little weight"). Lebron

v. State, 982 So.2d at 657-658. This Court found Lebron's sentence to death proportionate.

In this case, the aggravation and mitigation are similar, including a finding of non-statutory mental health issues. This Court can look to Lebron to find Smith's sentence to death proportionate.

In McLean v. State, 29 So.3d 1045 (Fla. 2010), the defendant, along with another man, invaded the home of Jahvon Thompson for the purpose of stealing money and marijuana or both. A neighbor, Theothlus Lewis, who heard the commotion, walked in on the robbery. McLean shot both Thompson and Lewis. Mr. Lewis survived. Mr. Thompson did not.

The jury recommended McLean be sentenced to death by a vote of 9-3. In aggravation, the trial court found: (1) McLean was under a sentence of imprisonment at the time of the murder, (2) McLean was previously convicted of a felony involving the use or threat of violence, based on McLean's prior armed robbery conviction and the contemporaneous conviction for the attempted first-degree murder of Lewis (great weight); and (3) McLean committed the murder during the commission of a robbery (great weight).

The trial court found both statutory mental mitigators had been established. The trial court also found six non-statutory mitigators: (1) mental health issues (no weight); (2) substance

abuse issues (little weight); (3) disparate treatment of codefendants (no weight); (4) family problems (little weight); (5) brain injury (little weight); and (6) miscellaneous factors, such as poor grades in high school, good behavior in court, and lack of positive role models in his youth (little weight).

On appeal, McLean claimed his sentence to death was disproportionate. This Court disagreed.

McLean is a good comparator case. Both the aggravation and mitigation are similar. McLean is more mitigated, however, because in McLean, the trial court found both statutory mental mitigators to exist. In this case, the trial court found no statutory mental mitigation and gave the age mitigator only moderate weight because Smith had exhibited maturity and responsibility in his every-day life. This Court should look to McLean to find Smith's sentences to death proportionate. *See also* Mungin v. State, 689 So.2d 1026 (Fla. 1997); Pope v. State, 679 So.2d 710 (Fla. 1996)(death sentence proportionate with prior violent felony aggravator and pecuniary gain aggravator, statutory mitigators of mental or emotional disturbance at the time of the crime and impaired capacity to appreciate the criminality of conduct or to conform conduct to the requirements of the law, and non-statutory mitigators including that defendant was intoxicated, was under the influence of mental or

emotional disturbance, and acted after a disagreement with his girlfriend).

ISSUE IV

WHETHER SMITH'S SENTENCES TO DEATH ARE UNCONSTITUTIONAL PURSUANT TO THE UNITED STATES SUPREME COURT'S DECISION IN RING V. ARIZONA (RESTATED)

In this claim, Smith alleges his sentence to death is unconstitutional pursuant to the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). Smith's claim should be denied.

For each of Smith's death sentences, the trial court found in aggravation that Smith had previously been convicted of a violent felony. These convictions were supported by Smith's convictions by a unanimous jury, beyond a reasonable doubt, of the contemporaneous murders of the other two victims. This Court has ruled consistently that Ring is satisfied when the defendant has previously been convicted of a violent felony based on the contemporaneous murders of the other victim(s). Chandler v. State, 75 So.3d 267, 269 (Fla. 2011)(Ring satisfied when Chandler was convicted of three contemporaneous murders); McGirth v. State, 48 So.3d 777 (Fla. 2010)(Ring satisfied because, *inter alia*, McGirth was convicted of the contemporaneous attempted first-degree murder of a second victim). Frances v. State, 970 So.2d 806, 822–23 (Fla. 2007) (rejecting application of Ring when the death sentence was

supported by the prior violent felony aggravating circumstance based on contemporaneous convictions for murder).

Additionally, Smith was convicted by a unanimous jury, beyond a reasonable doubt, of attempted armed robbery. (TR Vol. VI 1024). The trial court found in aggravation that Smith committed the murders in the course of an enumerated felony. (TR Vol. VI 1045). This Court has held that Ring is satisfied when the defendant commits the murder in the course of an enumerated felony. Gudinas v. State, 879 So.2d 616 (Fla. 2004)(noting that this Court has held that the aggravators of murder committed "during the course of an enumerated felony" and prior violent felony comply with Ring review because they involve facts that were already submitted to a jury during trial). *See also* Baker v. State, 71 So.3d 802 (Fla. 2011)(Ring is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony).

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court affirm Smith's convictions and sentences to death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF OF THE APPELLEE has been furnished by U.S. Mail to Ms. Nada Carey Esq., Assistant Public Defender, Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32302, this 8th day of June, 2012.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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