IN THE SUPREME COURT OF FLORIDA

CECIL SHYRON KING,

Appellant,

v. **CASE NO.: SC11-2258**

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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PRELIMINARY STATEMENT

Appellant, Cecil Shyron King, relies on the Initial Brief to reply to the State's Answer Brief with the following additions to Issues I and II:

ARGUMENT

ISSUE I
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE DEATH SENTENCE IMPOSED IS DISPROPORTIONATE.

King's proportionality argument is initially based on the position that his case involves only one validly found aggravating circumstance, that the homicide was committed during a burglary. The State relies on only one case to respond this argument, and the case is distinguishable because the defendant in that case had a

history of violence. (AB 40) In Ferrell v. State, 680 So.2d 390 (Fla. 1996), this court approved the death sentence based on a single aggravating factor of a prior violent felony – another murder. King has no history of violence, Ferrell is distinguishable. Of note, the State also referenced Lemon v. State, 456 So.2d 885 (Fla. 1984), but that case actually involved two aggravating circumstances – a prior violent felony (attempted murder) and that the murder was heinous, atrocious or cruel.

The State's primary argument relies on the assumption that the heinous, atrocious or cruel aggravating circumstances is validly found in this case. Further argument about the validity of the HAC finding will be addressed in Issue II. In support of its position, the State relies on Beasley v. State, 774 So.2d 649 (Fla. 2000), as a factually comparable case. (AB37-38) While there are similarities in Beasley and this case, a major distinction remains. In Beasley, the HAC factor was of particular weight and importance in this Court's decision to uphold Beasley's death sentence. Ibid. at 674-675. The victim in Beasley sustained many unambiguous defensive wounds reflecting the victim's awareness and suffering for an extended time. Ibid, at 670. As this Court wrote,

> . .. the medical examiner testified regarding numerous "typical defensive injuries" which Mrs. Monfort sustained in trying to fend off the killer's attack. Mrs. Monfort suffered these blows to the backs of both upper arms, to her left shoulder, and the back of her left forearm. Importantly, she had lacerations, bruises and abrasions on the backs of both hands...

* * * *

> Mrs. Monfort was not rendered immediately unconscious; rather she suffered a horrendous ordeal before her death. She was fending off a series of repeated, individual blows by a hammer which landed on her forearm, her shoulder, and her upper arms.

Ibid. In contrast in this case, the HAC circumstance, even if this Court approves it, is based on considerably more ambiguous evidence. There were only one or two possible defensive wounds in this case, a bruise to the back of the right hand and a injury to the knee. The medical examiner stated these could have been consistent with a reflexive, passive defensive movement. (T12:555-558) No other wounds consistent with defensive wounds were present suggesting the victim lost consciousness quickly. This is different than the evidence in Beasley where multiple defensive show the victim was aware for an extended period of time fighting off the attack.

Additional cases the State use are also distinguishable because of the evidence of a history of prior violence and other aggravation. In Miller v. State, 770 So.2d 1144 (Fla. 2000), the defendant had a prior conviction for a violent felony. In Woodel v. State, 985 So.2d 524 (Fla. 2008), Woodel was convicted of two first degree murders, armed robbery and armed burglary. There were four aggravating circumstances supporting Woodel's sentence – previous murder conviction, homicide during burglary, HAC and victim vulnerable due to age. In Barnhill v. State, 834 So.2d 836

(Fla. 2002), five aggravating circumstances were approved: prior violent felony, homicide during a robbery, pecuniary gain, HAC, and CCP. In Consalvo v. State, 697 So.2d 805 (Fla. 1997), the crime itself was significant because he burglarized and killed the victim and witness who had him charged for committing theft. He was apprehended in yet another burglary where evidence linking him to the murder was discovered.

King argues this homicide was the result of a panic reaction when he was surprised during the burglary. This Court has reversed cases where the crime was the result of such reaction during the commission of other crimes. See, e.g., Scott v. State, 66 So.3d 923 (Fla. 2011). The multiple wounds are reflective of an emotion charged panic. See, e.g., Penn v. State, 574 So.2d 1079 (Fla. 1991); Ross v. State, 474 So.2d 1170 (Fla. 1985). The State cites Mendoza v. State, 700 So.2d 670 (Fla. 1997), as one case where this Court rejected such a theory. Mendoza is different, however, because the defendant there had a history of violence that belies the assertion that the homicide was an out-of-character reactive event. King has no history of violence giving support to the assertion in his case that the crime was one of panic. This Court distinguished Mendoza from other cases where spur-of-the-moment killings during other felonies were involved because of the defendant's violent history. Mendoza, at 678-679.

ISSUE II
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The State has the burden to prove the especially heinous, atrocious or cruel aggravating beyond a reasonable doubt. See, e.g., Rhodes v. State, 547 So.2d 1201 (Fla. 1989); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Actions contributing to the victim's death occurring after the victim is dead or unconscious cannot be considered as proof of the HAC aggravating circumstance because victim awareness of physical pain or emotional pain of impending death is a component of establishing the existence of the HAC factor. See, e.g., Jackson v. State, 451 So.2d 458, 463 (Fla. 1984); Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983). While unconsciousness is a legal limitation on what evidence can be used as proof of the HAC aggravator, it does not mean that any evidence of acts committed before unconsciousness is sufficient to meet the State's burden of proof. For example, this Court has rejected the HAC circumstance, even though the victim was strangled, where the evidence demonstrated that the victim remained semiconscious throughout the strangulation that resulted in death. See, Rhodes v. State, 547 So.2d at 1208; Herzog v. State, 439 So.2d 1372. References in the State's brief to the medical examiner's theory that there could be some response to pain in an unconscious person, depending on how deep the coma, are unsubstantiated and irrelevant.

(T12: 573-574; AB 53) The especially heinous atrocious or cruel aggravating cannot be established merely on a demonstration that the victim suffered some brief time of pain before unconsciousness and death. Such a criteria could render any murder as qualifying for the aggravating factor which is the reason this Court established that there must be something "to set the crime apart from the norm of capital felonies." State v. Dixon, 283 So.2d at 9.

The evidence does not support the heinous, atrocious or cruel aggravator. Although the medical examiner testified that the bruise to the back of the hand and wound to the knee could have been defensive wounds, the testimony could not exclude the inference that the wounds were not defensive in nature. (T12:555, 570, 573, 57 6) The wounds here are not the unambiguous type of defensive wounds frequently seen in capital cases leading this court to affirm the HAC aggravator. See, Beasley v. state, 774 So.2d 649, 655, 669-670 (Fla. 2000) (multiple defensive wounds); Penn v. State. 574 So.2d 1079, 1083 f.n. 7 (Fla. 1991) (multiple defensive wounds); Heiney v. State, 447 So.2d 210, 216 (Fla. 1984)(multiple defensive wounds). The trial court and the State rely on such cases involving multiple, unambiguous defensive wounds. (R8:1273-1275; AB 50) Proof of the aggravator cannot be established solely on the basis that one of two or more inferences from the evidence support such proof — the defense is entitled to

the favorable inference from circumstantial evidence unless the State can refute it with substantial competent evidence. See, Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984)(circumstantial evidence rule applicable in proving aggravators) Additionally, the crime scene investigation showing marks in the blood found on the floor underneath the body suggesting the body moved in the blood does not establish that the victim was conscious at the time and experiencing pain. The marks can only show that the body moved in the blood. (T13:612-614) Both the trial court and the State overstate the evidence in suggesting these marks show conscious, volitional movement by the victim. (R8:1273-1275; AB 54) The movement of the body could have been involuntary movement after the victim was unconscious but before death. Moreover, the body could have simply been moved after death by another person either when the bedroom was ransacked or when the body was moved during the crime scene investigation.

The State failed to prove the HAC aggravator. Inclusion of the aggravator in the sentencing process unconstitutionally tainted the death sentence imposed. Amends. V, VI, VIII, XIV, U.S. Const. King now asks this Court to reverse his sentence.

CONCLUSION

For the reasons presented in this Reply Brief and the Initial Brief, Cecil King asks this Court to reverse his death sentence.

CERTIFICATE OF SERVICE AND COMPLIANCE I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Tamara Milosevic, Assistant Attorney General, Rivergate Plaza, Ste. 650, 444 Brickell Ave., Miami, FL 33131, at Tamara,Milosevic@mvfloridaleqal.com as agreed by the parties, and to appellant, Cecil King, #J25731, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this Aof day of September, 2012.

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a) (2).

Respectfully submitted,

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