IN THE SUPREME COURT OF FLORIDA

GARY MICHAEL HILTON,

Appellant,

v.

CASE NO. SC11-898

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-1000

ATTORNEY FOR APPELLANT
FLA. BAR NO. 0201170

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_____/

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant, Gary Michael Hilton, relies on the Initial Brief to reply to the State's Answer Brief with the following additions to ISSUE II:

ARGUMENT

ISSUE II
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT, THROUGH THE TESTIMONY OF DR. PRICHARD, ALLEGATIONS OF HILTON'S ARRESTS, PRIOR BAD ACTS AND UNCHARGED CRIMES THAT WERE IMPROPER, NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

The State asserts that all of Dr. Prichard's testimony in rebuttal was proper and admissible because Prichard was presenting his psychological opinion of Hilton. As a result, all of the allegations of past criminal behavior were admissible as the factual basis for the opinion. This premise is wrong. Although an expert may rely on information that is not admissible evidence to form an opinion, such reliance does not make the inadmissible information suddenly admissible evidence at trial. See, Sees. 90.704 & 90.705 Fla. Stat.; Jackson v. State, 648 So.2d 85, 90-91 {Fla. 1994); Caoehart v. State. 583 So.2d 1009 (Fla. 1991); Carratelli v. State, 832 So.2d 850, 861-862 (Fla. 4th DCA 2003). Section 90.705 Florida Statutes permits an expert to testify to an opinion without disclosing the underlying facts or information to prevent the use of the expert' s testimony to introduce inadmissible evidence. *Ibid.* The opposing party may explore such underlying, inadmissible information on cross-examination, but the proponent of the expert testimony may not. *Ibid.* However, such an improper, backdoor method of introducing nonstatutory aggravating circumstances was employed in this case.

In an effort to distinguish the cases Hilton presented in the Initial Brief, the State relies on a single case, Zack v. State, 911 So.2d 1190 (Fla. 2005). (AB 33-36) The defense in Zack presented a psychological expert who testified to an opinion that Zack suffered from poor impulse control and that he would lose control if someone pushed his "hot button." In rebuttal, the State offered a psychologist who opined that Zack had a hatred of women, not merely poor impulse control. Zack argued that the State's expert's opinion that Zack had a hatred of women was a nonstatutory aggravating circumstance. There was no issue in Zack about improper introduction of inadmissible facts in support of the opinion. This Court held that the State's expert's opinion testimony was not the same as introducing evidence of allegations of prior instances of violent conduct unrelated to the case being tried. As a result, this Court concluded the expert's testimony was not nonstatutory aggravation. Zack, 911 So.2d at 1208-1209.

Apparently, the State's position is that because the witness in this case and the one in Zack were experts rending an opinion, as opposed to lay witnesses, any of Prichard's testimony in this case about prior criminal conduct allegations are admissible. (AB 33-35) This ignores the limitations on testimony about inadmissible information used to form the opinions, as discussed above. See, Sees. 90.704 & 90.705 Fla. Stat.; Jackson; Capehart; Carratelli. The danger and prejudice of an expert being allowed to

testify to improper nonstatutory aggravation is just as real as the testimony coming from a lay witness. The State is prohibited from using any method as a ". ..guise for introduction of testimony about unverified collateral crimes." Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996); see, also, Geralds v. State, 601 So.2d 1157, 1163 (Fla. 1992); Perry v. State, 801 So.2d 78, 91 (Fla. 2001); Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986).

The State argues that the admission of Prichard's testimony about Hilton's alleged criminal behavior was harmless. Initially, State correctly notes that the defense had introduced some substantiated past criminal conduct in its case. (AB3 6) However, this past conduct, aside from Hilton's shooting an abusive stepfather when he was a juvenile, was primarily property offenses. In contrast, Prichard testified to unsubstantiated allegations he merely read about in a police interview of an exwife who did not testify. Moreover, when those allegations include sexual abuse of children, such allegations will likely inflame the passions of the jurors to the point that no amount of cautionary instruction from the trial court can cool. Additionally, Dr. Prichard raised, again, the unfounded assertion that Hilton had been involved in making the movie *Deadly Run*. Prichard also used the theme of that movie as a parallel to Hilton's actions claiming Hilton brought the movie to real life. (AB 52) (P4:592-593)

Hilton's penalty phase was tainted with the introduction of

nonstatutory aggravating circumstances based on unsubstantiated allegations of criminal conduct. He now asks this Court to reverse this case for a new penalty phase trial.

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Hilton asks that his judgments and sentences be reversed with direction to afford him a new trial for the reasons presented in Issue I. Alternatively, for the reasons in Issues I through VI, Hilton asks this Court to reverse his sentence of death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Meredith Charbula, Assistant Attorney General, Capital Appeals, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and to Appellant, Gary M. Hilton, Offender ID# 203672, Buncombe County Detention Facility, 20 Davidson Dr., Asheville, NC 28801, on this 12th day of June, 2012.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/ C. McLAIN Assistant
Public Defender Florida Bar
No. 201170 Leon Co.
Courthouse, #401 301 South
Monroe Street Tallahassee,
Florida 32301
bill.mclain@flpd2.com
(850) 606-1000 ATTORNEY FOR
APPELLANT