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IN THE SUPREME COURT OF FLORIDA

CARL DAUSCH,

Appellant,

vs.

CASE NO. SC12-1161

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR SUMTER COUNTY

APPELLANT'S REPLY BRIEF

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENTS

Point one. The State correctly concedes that Appellant's murder conviction cannot be affirmed on a felony-murder theory. The State now argues that the verdict "is well-supported on a premeditation theory," although it did not argue that theory to the jury. The evidence the State relies on does not amount to substantial proof of guilt; judgment of acquittal should have been granted.

Point two. The State argues that the Indiana officer's testimony had strong probative value. Had the officer testified that Mr. Dausch in 1987 was a slightly built blond man with no tattoos, the evidence would indeed have been probative. However, the man who abandoned the car did not, on balance, resemble Appellant, so the evidence had limited probative value. The prejudicial effect of an officer announcing that he knew Appellant well was, in contrast, considerable.

Point three. Appellant's suicide attempt should not have been revealed to the jury, since in light of the letter to counsel found at the scene the State could not establish that consciousness of guilt motivated the attempt. The court knew the attempt could be explained, but the jury never heard the explanation; allowing the State to prove the attempt without the explanation was unfair and prejudicial.

Point four. More than one of the jurors who served in this case was caught in a material lie to the court, yet they were permitted to give a life-or-death

recommendation. This amounts to structural error as to the penalty phase. The jurors' conduct further undermines confidence in their willingness to follow their guilt-phase instructions. Given the gravity of the misconduct, this court should err on the side of caution and reverse Appellant's conviction as well as his sentence.

Point five. The State correctly acknowledges cases which hold that the non-constitutional "merger" doctrine precludes the dual convictions entered below.

Point six. The State relies on the trial court's finding that the victim was "bound, beaten...and left to die." That finding is not supported by substantial, competent evidence; nor is the court's finding that it would have taken considerable time for the victim to die. The record does not show the victim's awareness of impending death, and thus does not support the ruling that the killing was heinous, atrocious, or cruel.

Point seven. Appellant relies on his initial brief as to this point.

Point eight. Dr. Chacko affirmatively testified, after interviewing Appellant, that he *suffered chronic brain damage from drug abuse* and that *brain damage causes impulse-control problems.* The testimony established that Appellant's heavy drug use took place in his early youth, and the crime was committed when he was 29 years old; the proof thus shows that his chronic brain damage predated the murder. On those facts, the court should have given more than

minimal weight to the non-statutory mitigating factor of brain damage.

Point nine. The State argues death is the appropriate penalty in this case, relying on its conclusions that the victim was tied before his death, that the mental-health mitigation was not tied to the date of the offense, and that the murder in this case was "brutal in the extreme." None of those conclusions is warranted by the record; this case is not one of the most aggravated and least mitigated to come before this court.

Point ten. Appellant relies on his initial brief as to this point.

Point eleven. Appellant relies on his initial brief as to this point.

ARGUMENT

POINT ONE

IN REPLY: APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE FIRST-DEGREE MURDER CHARGE SHOULD HAVE BEEN GRANTED. THE ORDER DENYING ACQUITTAL RESULTED IN VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW, PROTECTED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

FELONY MURDER

The State correctly concedes that the conviction appealed from on Count I cannot be affirmed on a felony-murder theory. (Answer brief at 40-41) On Count II, the jury found Appellant not guilty of sexual battery and instead guilty of the lesser included offense of aggravated battery. (VI 1119) Aggravated battery is not one of the felonies enumerated in the felony-murder statute. Section 782.04 (1)(a)(2), Florida Statutes. See Brown v. State, 959 So. 2d 218, 221 (Fla. 2007), and Mahaun v. State, 377 So. 2d 1158 (Fla. 1979).

PREMEDITATION

The State now argues that the verdict on Count I "is well-supported on a premeditation theory," although it did not argue that theory to the jury. (Answer Brief at 41) In support of its current position, the State asserts that the victim "had several skull fractures." (Answer brief at 4, 41) What Dr. LaMay testified was that

the bridge of the victim's nose was broken, and that there were in addition "several small fractures in the cribriform plate." (XIII 437) The cribriform plate is one of four components of the ethmoid bone, which is located between the orbits of the eyes. Henry Gray, Anatomy of the Human Body, Part II (Osteology), §5(a)(6) at fig. 149 (1918).[1] The ethmoid bone "is a very thin bone, almost as thin as paper in places, and a portion of it...called the cribriform plate...is not only very thin, but is pierced and further weakened by a number of foramen for the passage of...nerves. This bone is frequently fractured by blows on the head." National Life & Accident Ins. Co. v. Kendall, 59 S.W. 2d 1009, 1013 (Ky. 1933). The fact that the cribriform plate was broken along with the nasal bridge does not tend to establish that the victim's death was premeditated.

The State does not expressly refute Appellant's argument that for all the trial testimony shows, as few as two blows caused the victim's death. (See initial brief at 36) The State does generally assert that the photos in the record show injuries which "are extensive, to say the least, and obviously took some time to inflict." (Answer brief at 41) In support of that argument it asserts that the injuries are "fairly depicted" in State Exhibits 2, 8, 9, 12, 13, and 14. (Answer brief at 41) Exhibits 8 and 9 show the victim, with his face unsurprisingly much bloodied in

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[1] Gray's Anatomy appears online at www.bartleby.com/107/

light of his broken nose, at the crime scene. Exhibits 13 and 14 are drawings by the medical examiner which reflect her interpretation of what she saw. (XIII at 434-35 and 438-39) Appellant agrees that Exhibits 2 and 12 "fairly depict" the victim's injuries, and maintains his position that the damage visible in those photos does not support a finding of premeditation.

The State relies on the fact the victim's wrists and ankles were tied, and argues that *the only* reasonable inference to be drawn from that fact is that a premeditated killing was afoot. (Answer brief at 40-41) The record, although not the proof, suggests another inference: before trial, the parties discussed whether the defense would be allowed to prove that the victim was known for homosexual activity with hitchhikers. (IX 1612-29, 1689-93) The judge announced he would rule after hearing a proffer, and the defense did not pursue the matter. (IX 1626-27, 1689-93)

The State asserts that "there would be no reason at all to restrain an unconscious victim," citing to Russ v. State, 73 So. 3rd 178, 193-94 (Fla. 2011). (Answer brief at 41-42) In that case Russ used a "complex series of knots" to tie his victim, and the force used to bind her dislocated her shoulder. Id. at 192-94. She was killed by strangulation, blunt force trauma to her head, and four stab wounds; the medical examiner testified that her wounds showed she had moved from side

to side in an effort to pull away from the ligature around her neck. Id. at 184, 197. This court concluded that logically speaking, three methods would not have been used to kill the victim had she been quickly rendered unconscious. Russ at 197. The proof at the trial of this case does not support the inference that the victim was tied before he was battered any more strongly than it supports the competing inference that the body was trussed after death for ease in dragging the body away from the road.

IDENTITY

The State does not dispute Appellant's contention that the evidence against him was circumstantial. (Answer brief at 38-45) Specifically, the State does not dispute his contention that evidence of DNA similarity is a circumstance from which guilt can be inferred, rather than direct evidence of guilt. Appellant maintains his position that the evidence against him was circumstantial, and that it was not inconsistent with his hypothesis that someone else committed the murder.

As to identity, the State relies on Appellant's suicide attempt as "very strong" evidence of consciousness of guilt, without acknowledging the letter to counsel found at the time. (Answer brief at 42) As argued in the initial brief, the letter shows that Appellant's state of mind at the time was despair over the imminent prospect of being *wrongfully* convicted of murder.

The State further relies on the fact that fingerprint and DNA evidence place Appellant in the victim's car. (Answer brief at 42-44) It now asserts that that evidence "places Dausch *in possession of* the victim's car." (Answer brief at 43; emphasis added) It was conceded by the defense below that the defendant rode in the car as a hitchhiker, but as to the inference he *possessed* the car, the State's latent print examiner testified that the prints he analyzed were left on or around the passenger doors, rather than the driver's side interior of the car. (XIII 584-85)

The State further relies on the assertion that the appearance of the man who was seen abandoning the car in Tennessee was "consistent with Dausch's appearance at the time." (Answer brief at 42) It points to 1985 and 1988 photos of the defendant which the defendant's brother-in-law described as accurate; the photos show he had longish blond hair, and a mustache on one occasion and a beard on the other. (X Exh. 30, 31; XV 816-17) It further points to a 1987 composite drawing of the man State witness Douglas Lee saw abandoning the car; the drawing shows longish brown hair and a mustache. (X Exh. 16; XIII 479-80) However, the similarities between the two men end there. Lee admitted that when he spoke to police in 1987, he described a man wearing a T-shirt and shorts, and made no mention of any tattoos. (XIII 475, 496) The defense introduced a photo of the defendant which was taken during the family's 1987 Florida vacation. (XIV

790-92) That photo shows prominent tattoos from the defendant's shoulders to his wrists. (X Defense Exh. 1) The photo further corroborates the brother-in-law's testimony that the defendant at the time was a musclebound man of 225 pounds who was over six feet in height. (XIV 791-92) Douglas Lee admitted that in 1987 he described the man he saw as 5'9" or 5'10" tall, and 160-185 pounds. (XIII 486)

The alleged similarities between the two men fail to amount to the "substantial evidence" of identity which the State must adduce. In Huggins v. State, 453 So. 2d 835 (Fla. 5th DCA), *cert. den.*, 456 So. 2d 1182 (Fla. 1984), the appellate court reversed a conviction where the proof of identity was limited and where a description of the perpetrator given at the time of the crime by the only eyewitness tended to affirmatively exclude the defendant as the perpetrator. The District Court in Huggins expressly applied this court's holding in Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), that competent *and substantial* evidence must underlie a criminal conviction. Huggins at 837-38, *citing* Tibbs, 397 So. 2d at 1123.

The State finally relies on the testimony of its DNA expert, Robin Ragsdale. It asserts that she testified that "DNA from the scene matched Dausch in six loci." (Answer brief at 4 and n.25) What she testified was that the original DNA extracted in this case was an undifferentiated mix of the victim's and the donor's

cells, which matched Dausch's known sample at four loci, and that once she succeeded in separating the two samples, the profile "foreign" to the victim matched Dausch's known sample at two loci. (XIV 754-56) As this court explained in Butler v. State, 842 So. 2d 817 (Fla. 2003), when a DNA analyst concludes that genetic material is the same in both a known and an unknown sample at the same genetic location, the likelihood that that similarity would appear in the general population is computed as a percentage. 842 So. 2d at 829 and n.6. When an analyst finds two such similarities between a known and an unknown sample, the likelihood that *both* similarities would appear in a single member of the general population is computed by multiplying the two percentages. Id. Use of this "product rule" is universally accepted. Butler at 829. Here Ms. Ragsdale's low probability numbers - all she could say with certainty was that one in 29 Caucasian males would "match" the perpetrator in the same manner that Mr. Dausch matches him - are explained by the fact that she saw similarities at only two loci. Moreover, her inculpatory conclusion was not joined by the other three experts in the case, *including two experts originally hired by the State.* Her testimony, combined with the other evidence the State relies on, does not amount to substantial proof of guilt, and this court should accordingly hold that judgment of acquittal should have been granted.

POINT TWO

IN REPLY: THE INDIANA OFFICER'S TESTIMONY THAT HE KNOWS THE DEFENDANT WAS HIGHLY PREJUDICIAL. THE MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED. DENYING THE MOTION RESULTED IN DEPRIVATION OF THE RIGHT TO DUE PROCESS OF LAW, PROTECTED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

The State asserts that the issue raised on this point was not preserved for appeal because the defense "never objected to any part of the officer's testimony," but objected only to the State's showing the officer a photograph. (Answer brief at 45) The record does not support this assertion. After a request to approach, and an unrecorded bench conference, the court recounted the objection for the record:

> THE COURT: Defense counsel has objected to the identification by a law enforcement officer from the State of Indiana from basically what was in 1987 having known the defendant.

(XIV 682) Defense counsel rejoined as follows:

> DEFENSE: I would just like to add to the argument. Since we were at sidebar - I would like to expand on it slightly. We can't confront. We cannot get up and cross-examine this witness to try to show that he really didn't know what Carl looked like back in 1987 without opening the door to our client's criminal record.... [T]he prejudice is just incredible, I think, because he said that he is a law enforcement officer this whole time. There has been nothing said about how he knew him, and the jury is going to come to one conclusion, and that being he

> knew him because of criminal activity.

(XIV 683-84) After an interruption the court inquired as follows:

> THE COURT: [T]here was an objection made...we should address the objection.
>
> DEFENSE: Your Honor, the defense objected to the testimony of the law enforcement officer from Indiana. The State laid a long predicate about his law enforcement experience. He placed him in Indiana, which the jury knows is the state from which Mr. Dausch comes. He has clearly identified himself as a law enforcement officer.

(XIV 687)

> DEFENSE: [M]y authority for that and my reason for objecting is I believe that it is so prejudicial because it creates the inference that my client has been involved in criminal activity.

(XIV 688) The State argued the objection had come late. (XIV 689-90) The court discussed the controlling caselaw and sustained the objection. (XIV 691-94) The record shows the defense clearly objected to the officer's testimony.

The State further argues, as to preservation, that the court did not abuse its discretion in denying a mistrial since "Dausch specifically did not ask for a cautionary instruction of any sort." (Answer brief at 47) After the court sustained the defense objection, the defense unsuccessfully moved, outside the jury's presence, for a mistrial. (XIV 694-98) The court gave the defense its choice how

to proceed when the jury returned; the defense declined a curative instruction, noting "that just reinforces it," and the court agreed, noting "[c]urative instructions usually exacerbate the problem." (XIV 698-99) The State cites no authority for its position that expressly declining to seek a curative instruction in conjunction with a motion for mistrial is fatal to preserving the question whether the mistrial should have been granted. Where counsel injects improper matter into a jury trial, opposing counsel preserves the issue for appeal by timely objecting and asking for a curative instruction *or* a mistrial. Companioni v. City of Tampa, 51 So. 3rd 452, 456 (Fla. 2010), citing Wilson v. State, 436 So. 2d 908 (Fla. 1983). Accord Walker v. State, 707 So. 2d 300, 313-14 and n.8 (Fla. 1997) (applying rule where prosecutor sought to elicit inadmissible testimony).

Finally as to preservation of this point, the State argues that "[t]he objection at trial was not framed in federal due process terms." (Answer brief at 47) This court holds that a point is preserved where trial counsel makes a timely objection and states a legal ground for it, and where appellate counsel pursues the specific contention asserted in the trial court. E.g., Harrell v. State, 894 So. 2d 935, 940 (Fla. 2005). This court does not limit appellate counsel to citing the same authority relied on in the trial court; on the contrary, this court holds that the purpose of an appellate brief is to elucidate, through argument, points that were raised below.

Ferrell v. State, 29 So. 3rd 959, 968 n.6 (Fla. 2010). On this point Appellant now makes the same claim he made below, citing some of the same caselaw as well as additional caselaw. Had he merely referred this court to the transcript and the cases cited below, he would have risked this court's rejecting this point as insufficiently argued. Ferrell at n.6.

As to the federal constitutional authority cited by Appellant, the State argues that Thigpen v. Thigpen, 926 F. 2d 1003 (11th Cir. 1991), is no longer valid precedent since it predates passage of the current federal statute that enables habeas corpus review of state-court judgments. Appellant has relied on Thigpen for the principle that federal due process protection is affected when evidence that was improperly admitted over objection in a state-court criminal trial was "crucial, critical, [and] highly significant." The federal courts still apply that standard, notwithstanding passage of the new habeas statute. See Burger v. Woods, 2013 WL 613382 *3 (6th Cir. 2013); Green v. Secretary of Department of Corrections, 2012 WL 5438940 *6 (M.D. Fla. 2012).

On the merits, the State argues that the Indiana officer's testimony had strong probative value and therefore was properly elicited. (Answer brief at 47) Had the officer testified that Mr. Dausch in 1987 was a slightly built blond man with no tattoos, the State would be correct to argue, in light of Douglas Lee's

testimony, that that evidence was indeed probative of guilt. However, the fact that both the man who abandoned the car and Appellant were blond in 1987, combined with the fact that the man who abandoned the car did not otherwise resemble Appellant, has limited probative value. The prejudicial effect of an officer announcing that he knew Appellant well was, in contrast, great. The State relies solely on Randolph v. State, 556 So. 2d 808 (Fla. 5th DCA 1990), for a principle that no prejudicial inference tends to arise from the fact one is known to a policeman from one's home area. In Randolph, the court held that no *fundamental* error took place in the trial of that case when similar testimony was introduced and commented on. Day v. State, 105 So. 3rd 1284 (Fla. 2d DCA 2013), in contrast, supports Appellant's argument; in Day the Second DCA held that an officer who identifies a criminal defendant should not be permitted to tell the jury what line of work she is in. Day, and the cases cited in Appellant's initial brief on this point, warrant reversal of the conviction appealed from.

POINT THREE

IN REPLY: IT WAS ERROR TO ALLOW PROOF OF APPELLANT'S SUICIDE ATTEMPT. ONCE THE ATTEMPT WAS PROVED, IT WAS ERROR TO EXCLUDE HIS SUICIDE LETTER TO REBUT THE INFERENCE OF CONSCIOUSNESS OF GUILT. APPELLANT WAS DENIED THE MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE GUARANTEED BY THE FEDERAL CONSTITUTION.

Appellant maintains his position that the suicide attempt should not have been revealed to the jury, since in light of the defendant's letter the State could not establish that consciousness of guilt motivated the attempt. As to this point Appellant relies on Penalver v. State, 926 So. 2d 1118 (Fla. 2006), a case the State does not acknowledge or attempt to distinguish.

The State concedes that *"I'm being led to the slaughter"* sets out the defendant's then-existing state of mind, but argues that the letter is inadmissible as a whole in that it contains inadmissible self-serving hearsay that does not tend to reveal the defendant's state of mind. The letter is a cry from the heart: it conveys to defense counsel the blistering message *"I'm being railroaded, and you know you could have done more to stop the train."* His statements to that effect put *"I'm being led to the slaughter"* in context. This court holds that when inadmissible statements are admitted to establish the context of admissible statements, they are

not hearsay because they are not offered for the truth of the matter asserted. McWatters v. State, 36 So. 3rd 613, 638 (Fla. 2010), *citing* Jackson v. State, 18 So. 3rd 1016 (Fla. 2009).

The State further argues that allowing the defendant to testify through the letter would have been "contrary to any notion of a fair trial." (Answer brief at 50) What the jury would have heard, if the letter had come in, would not have added much to the fact that the defendant pleaded not guilty. What the jury actually heard was in no small way unfair: proof of a suicide attempt on the eve of trial *without more* implies consciousness of guilt, and the State so argued in closing. The court knew at the time the suicide attempt was proved that the attempt could be explained, but the jury heard no trace of the explanation. In the analogous situation where a party relies on only part of a document or recorded statement, the opposing party may invoke the rule of completeness in those cases where *in fairness* it should be allowed to do so. E.g., Kaczmar v. State, 104 So. 3rd 990, 1000-01 (Fla. 2012). The reason for the rule of completeness is to avoid the potential for misleading impressions where statements are taken out of context. Id. Here the jury received a misleading impression, and the prejudice to the defendant - combined with the prejudice from the Indiana officer's testimony - was significant. This court should reverse and remand for a new trial.

POINT FOUR

IN REPLY: THE JURY FOREMAN'S GOOGLE SEARCH AND RELATED CONDUCT AMOUNTED TO MISCONDUCT. THE MOTIONS FOR A NEW TRIAL AND FOR A NEW PENALTY-PHASE JURY SHOULD HAVE BEEN GRANTED. DENIAL OF RELIEF RESULTED IN DENIAL OF APPELLANT'S RIGHTS PROTECTED BY ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

PENALTY PHASE

The State argues that Appellant exaggerates the jurors' misconduct; it asserts that "a single juror ran...a single search...and commented on the result...to a small number of the other jurors." (Answer brief at 52) The record shows that fully half of the jurors took part in a lively discussion: Thompson and Adkinson admitted Eck told them what he had read, Weatherford admitted he overheard the discussion, Cassidy admitted Eck and Weatherford both told him what they had learned, and Kyler admitted he asked about the research, but denied hearing anything of substance. The bailiff testified that she saw, or heard, Eck reading off his cell-phone. Weatherford and Eck, of course, both denied telling anybody anything. Appellant stands by his argument that this record shows significant misconduct.

The State dismisses the significance of the research results to the extent they

indicated Appellant went to Disney World during his 1987 vacation after a falling-out with his family. It argues the jury probably presumed the press got its facts wrong, rather than concluding they had had information kept from them. The jury in this case had just heard the defense emphasize in its guilt-phase closing that the State had never placed the defendant near Sumter County. (XVI 1064-65, 1078-79) The jury also heard the usual admonition

> [t]he attorneys are trained in the rules of evidence and trial procedure. It is their duty to make all objections they feel are proper. When an objection is made, you should not speculate on the reason why it was made. Likewise, when an objection is sustained or upheld by me, you must not speculate on what might have occurred had the objection not been sustained or what a witness might have said if they had been permitted to answer.

(XII 346) See Fla. Std. Jury Instr. (Crim.) 2.1 (Preliminary Instructions). Since the jurors were apprised that lawyering might well keep available facts from them, it is no stretch to infer they may well have blamed the defense team for keeping a Disney World detour by the defendant quiet.

The State dismisses the jury's reason for distrusting defense counsel by quoting the Eleventh Circuit, which has stated that a capital defendant "does not arrive at the penalty phase...with a clean slate, and there is no point in pretending otherwise." Green v. Zant, 738 F. 2d 1529, 1542 (11th Cir. 1984). Green unsuccess-

fully requested a penalty-phase instruction stating that he was presumed innocent of aggravating factors; the Eleventh Circuit found no error, noting that the State's guilt-phase proof generally encompasses a good deal of proof of aggravating factors. Id. at 1541-42. It does not follow that a jury entrusted with a capital sentencing recommendation causes no problem by doing independent research that has the effect of casting doubt on counsel's candor.

The State urges this court to conclude that any error on this point is harmless beyond a reasonable doubt, since the jurors assured the judge they were able to fairly reach a penalty phase verdict. As defense counsel argued below, the court's ability to trust the jurors to follow their penalty-phase instructions is strongly brought into doubt by this record. Here more than one juror was caught in a material lie, yet they were permitted to give a life-or-death recommendation; for the reasons argued in the initial brief, this amounts to structural error. Appellant has shown this court should reverse his sentence and remand for a new penalty phase with an impartial jury.

GUILT PHASE

The State argues that since the defense never sought a mistrial below, Appellant is barred from making any argument as to the guilt phase on this point. (Answer brief at 56 and n.28) The misconduct was not brought to light until after

the guilt phase verdict had been returned; at that procedural juncture the defense reasonably sought a new trial rather than a mistrial. The defense clearly stated below that the misconduct amounted to grounds for a new guilt-phase trial (IX 1759-64, 1767), and the point was thus preserved for appeal.

On the merits, the State argues that "[b]ecause the claimed misconduct took place after the guilty verdict had been announced, the only issue is whether Dausch should have a new penalty phase." (Answer brief at 51) As Appellant has argued, more than one juror lied to the court during its inquiry, either to stay on the jury or to protect their own interests. That behavior undermines confidence in this jury's willingness to follow its guilt-phase instructions as well as its penalty-phase instructions. Given the gravity of the misconduct, this court should err on the side of caution and reverse Appellant's conviction as well as his sentence.

POINT FIVE

IN REPLY: DOUBLE JEOPARDY RESULTED WHEN THE COURT ADJUDICATED APPELLANT GUILTY OF BOTH FIRST-DEGREE MURDER AND AGGRAVATED BATTERY.

The State correctly acknowledges that State v. Sturdivant, 94 So. 3rd 434 (Fla. 2012) and Mills v. State, 476 So. 2d 172 (Fla. 1985) govern this case. (Answer brief at 59) In both cases this court held that the non-constitutional "merger" doctrine prevents convictions for both a completed murder and an aggravated battery committed on the same victim during the same series of events. Sturdivant, 94 So. 3rd at 441-42 and n.8, *citing* Mills. Reversal of the aggravated battery conviction entered below is thus warranted.

POINT SIX

IN REPLY: THE STATE DID NOT SHOW BEYOND A REASONABLE DOUBT THAT THE CHARGED MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. THE PROOF FAILED TO MEET THE REQUIREMENTS OF THE FEDERAL CONSTITUTION OR THIS COURT'S CASELAW.

The State notes that strangulation deaths are regularly deemed to be heinous, atrocious, or cruel, and argues that "[f]or analysis purposes" all deaths that result from lack of oxygen to the brain are the same as strangulation deaths. (Answer brief at 63) This may be true for medical personnel, but as far as legal analysis is

concerned, this court holds that strangulation murders *prima facie* meet HAC criteria *because the victim is necessarily aware of his impending death.* Caylor v. State, 78 So. 3rd 482, 499 n.8 (Fla. 2011); Russ v. State, 73 So. 3rd 178, 197 (Fla. 2011); Orme v. State, 25 So. 3rd 536, 551-52 (Fla. 2009); Frances v. State, 970 So. 2d 806, 815 (Fla. 2007). As Appellant argued in his initial brief, this court has expressly held in Williams v. State, 37 So. 3rd 187, 199 (Fla. 2010) and Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1988), that the victim's awareness of impending death is necessary to a finding of HAC. The State cites Williams (Answer brief at 61-62), but does not acknowledge that the case so holds.

The State also argues that the victim in this case "was subjected to a brutal beating." (Answer brief at 63) As Appellant has argued, the record does not preclude the possibility that the victim was killed by two blows, one to the bridge of the nose and the other a kick or "stomp" to the chest. Appellant relies on the argument made in his initial brief distinguishing the beating cases in which this court has found HAC to be present.

The State further argues that the record shows the victim's injuries "are consistent with the victim lying on the ground when the injuries were inflicted." (Answer brief at 64, n.32) It cites no witness and no record page for this conclusion. While the medical examiner agreed with the prosecutor that the marks

left by the blow to the chest are consistent with a "stomp," no such opinion was elicited regarding the injuries to the victim's face.

The State also relies on the medical examiner's testimony that skin slippage had begun on the victim's arms at the time she conducted the autopsy, and that therefore she could not determine whether his arms bore signs of having chafed against restraints. (Answer brief at 64; XIII 464-65) The photos in the record show that the body was tied at the wrists and ankles; the State resorts to speculation when it argues that restraints may have been used on the victim's arms before death.

As noted above at Point One, the record does not support the theory that the victim was tied before death. The State relies on the trial court's finding that the victim was "bound, beaten...and left to die;" as argued in the initial brief, that finding - along with the finding that it would have taken considerable time for the victim to die - is not supported by substantial, competent evidence in the record. This court, as it did in Williams, supra, should reject the court's findings since they are not supported by the record, and should reject its ruling that the HAC aggravator was proved.

POINT SEVEN

IN REPLY: THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AGGRAVATING FACTORS THAT WERE UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE. APPELLANT'S RIGHT TO HEIGHTENED RELIABILITY IN PENALTY PHASE PROCEEDINGS, PROTECTED BY THE FEDERAL EIGHTH AMENDMENT, WAS ADVERSELY AFFECTED.

Appellant will rely on his initial brief as to this point.

POINT EIGHT

IN REPLY: THE RECORD DOES NOT SUPPORT THE COURT'S REASON FOR GIVING MINIMAL WEIGHT TO MITIGATING EVIDENCE THAT SHOWS APPELLANT SUFFERS FROM ORGANIC BRAIN DAMAGE. APPELLANT'S RIGHT TO HEIGHTENED RELIABILITY IN PENALTY PHASE PROCEEDINGS WAS ADVERSELY AFFECTED.

The State argues as follows:

- "there is no showing, and no citation to the record, to support the idea that Dausch was 'suffering' from 'brain damage' at the time he killed Adrian Mobley in 1987." (Answer brief at 69)
- "[t]here is no evidence that whatever Dausch's mental status was at the time of trial accurately mirrors his mental status in 1987." (Answer brief at 69)
- the testimony showed only that Appellant "has used drugs that may cause brain damage." (Answer brief at 70)

Conversely, the State correctly concedes that "In [Dr.] Chacko's opinion, Dausch suffered 'chronic brain damage' due to abusing 'powerful drugs for extended periods of time.... Chacko corroborated Dausch's drug use through self-reports and [interviews].... Dausch abused PCP, LSD, injected cocaine, crystal meth, and abused alcohol.... Chacko said that prolonged abuse of drugs and alcohol 'caused a certain degree of brain damage.' ...Chacko said 'patients with brain damage are known for impulse control [problems]. They tend to explode with little or no provocation.'" (Answer brief at 33-34)

Dr. Chacko affirmatively testified, after interviewing Appellant, that he *suffered chronic brain damage from drug abuse.* (XVII 1323-24, 1330) That testimony distinguishes this case from Bolin v. State, 2013 WL 627146 (Fla. 2013). In Bolin, a doctor testified that the defendant is mentally ill, and that his symptoms, which include impulse control problems, are lifelong but wax and wane. 2013 WL 627146 at *11. The trial court rejected the statutory mitigator of substantially impaired capacity to conform to the law; this court affirmed, noting that since Bolin did not discuss the night of the murder with the doctor, that witness could not testify whether Bolin's psychotic symptoms affected him that night. Id. In this case, there was no testimony, and no suggestion, that Appellant's brain damage manifests itself in symptoms that "wax and wane," and nothing that suggests that "chronic" means

anything other than "continuous." The testimony at the penalty phase established that Appellant's drug abuse took place in his early youth, and the State's brief notes that the crime took place when he was 29 years old. (Answer brief at 1, 20 n.17) Accordingly the trial court's conclusion that nothing tied the testimony about brain damage to the time of the murder is not supported by the record.

The State further argues that the record shows deliberate rather than impulsive action by the murderer, in that the murderer tied the victim then beat him to death, then hid the body and fled the scene. (Answer brief at 69) As argued above, the record does not support the theory that the victim was tied then beaten. The bare facts that the murderer dragged the body behind some trees, then fled the scene, do not suggest that a well-planned endeavor was underway. In Peterson v. State, 94 So. 3rd 514 (Fla. 2012), in contrast, the defendant borrowed a truck that would not be associated with him, scouted a remote location for the murder and lured the victim there, and took two weapons and a change of clothes with him to the scene. 94 So. 3rd at 531. The trial court gave little weight to penalty-phase testimony about the effects of Peterson's chronic drug use, writing that "the manner in which the defendant planned, prepared, and executed this complex scheme to kill and evade responsibility for the killing make it glaringly evident that the defendant was clear headed and rational during the period leading up to the murder." Id. at

536. This court, unsurprisingly in light of the record, affirmed that ruling. Id. This case is clearly distinguishable from Peterson and warrants a different result; this court should reverse Appellant's sentence and remand for the trial court to reweigh the mitigating evidence.

POINT NINE

IN REPLY: THE DEATH PENALTY IS NOT PROPORTIONAL IN THIS CASE.

The State argues death is the appropriate penalty in this case, relying on its conclusions (a) that the victim was tied before his death, (b) that the mental-health mitigation was not tied to the date of the offense, and (c) that the murder in this case was "brutal in the extreme." (Answer brief at 72-73) Appellant maintains his position that none of those conclusions is warranted by the record.

The State argues that Bright v. State, 90 So. 3rd 249 (Fla. 2012), Blackwood v. State, 777 So. 2d 399 (Fla. 2000), and Spencer v. State, 691 So. 2d 1062 (Fla. 1996) support its position, in that the present case is similar to each of those cases *and* reflects more aggravation than each of those cases. (Answer brief at 72-73) In Bright, victim King died from 58 hammer blows, 38 of them to his head, and exhibited defensive wounds; Bright's second victim, Brown, had 8 to 10 skull fractures as well as defensive wounds. In Blackwood, the medical examiner testified that the victim struggled for "a while" against strangulation, which was

accomplished with a ligature and with soap and a washcloth lodged in her throat. In Spencer, the medical examiner testified that the victim lived for ten to fifteen minutes after the attack on her began; she died after having her face slashed, being slammed on a concrete wall three times, and being stabbed four to five times to the chest. See Spencer v. State, 645 So. 2d 377 (Fla. 1994). Appellant's case is substantially more similar to the cases cited in the initial brief on this point, and reversal of the sentence imposed below is warranted.

POINT TEN

IN REPLY: FLORIDA'S STANDARD PENALTY PHASE INSTRUCTIONS, AS READ IN THIS CASE, VIOLATED THE APPELLANT'S FEDERALLY-PROTECTED RIGHTS TO DUE PROCESS AND TO HEIGHTENED RELIABILITY IN PENALTY-PHASE PROCEEDINGS.

Appellant will rely on his initial brief as to this point.

POINT ELEVEN

IN REPLY: THE TRIAL COURT ERRED IN DENYING RELIEF BASED ON RING v. ARIZONA.

Appellant will rely on his initial brief as to this point.

CONCLUSION

Appellant has shown that this court should reverse his convictions and order his discharge, because insufficient competent, substantial evidence established he was the perpetrator of the charged offenses.

If that relief is denied, Appellant has shown that this court should reverse his murder conviction and remand for entry of judgment of guilt as to second-degree murder, on the ground the proof did not establish premeditation. If that relief is granted this court should further remand for vacation of the aggravated battery conviction entered on Count II.

If that relief is denied, Appellant has shown he is entitled to a new guilt phase trial based on his evidentiary and jury-misconduct arguments.

If that relief is denied, Appellant has shown that this court should reduce his death sentence to a life sentence, as a result of striking the HAC factor, proportionality analysis, or both.

If that relief is denied, Appellant has shown that this court should reverse the sentencing order and remand for a new penalty phase, based on juror misconduct or on the jury instructions given in the penalty phase.

If that relief is denied, Appellant has shown that this court should reverse the sentencing order appealed from and remand for reweighing of mitigation.

Respectfully submitted,

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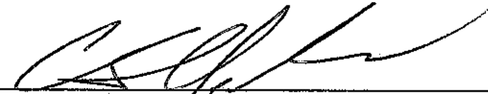
PUBLIC DEFENDER



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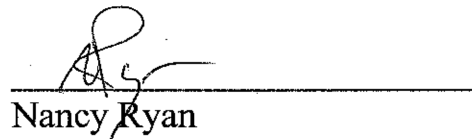
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing reply brief has been electronically delivered to Assistant Attorney General Kenneth Nunnelley, at 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, and mailed to Carl Dausch, DOC #134926, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026-1000, on this 8th day of April, 2013.

Nancy Ryan

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.



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