IN THE SUPREME COURT OF FLORIDA

KENNETH JACKSON, :

Appellant, :

vs. : Case No. SC13-1232

STATE OF FLORIDA, :

Appellee. :

_____:

REPLY BRIEF OF APPELLANT

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ISSUE I

FLORIDA'S DEATH SENTENCING SCHEME VIOLATES THE SIXTH AND EIGHTH AMENDMENTS OF THE U.S. CONSTITUTION IN LIGHT OF RING V. ARIZONA 546 U.S. 584 (2002).

The United States Supreme Court heard oral arguments in Hurst v. Florida, Case No. 14-7505 on October 13, 2015. If the United States Supreme Court finds that the death recommendation must be unanimous in order to pass constitutional muster, it will be controlling in this case and Jackson's sentence will be unconstitutional. Florida has long required unanimous verdicts in criminal cases. Florida Rule of Criminal Procedure 3.440 states: "No verdict may be rendered unless all of the trial jurors concur in it." Florida's sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) because when the jury has finished its work, a defendant is still not eligible for the death penalty.

Appellee argues that the jury finding of guilt on the contemporaneous felony of sexual battery makes Jackson independently eligible for a death sentence under Florida law. Under Florida Statute 921.141 (2007), a defendant is not eligible for death absent written findings of facts made by a judge based upon aggravating and mitigating circumstances. A defendant is not eligible for death because there is no set of circumstances under

which the death penalty may be imposed absent judicial written findings of fact.

Thus more is needed than simply a finding of guilt on a contemporaneous felony to comply with the dictates in Ring v. Arizona, 536 U.S. 584 (2002) and the Florida sentencing statute. As Justice Anstead wrote in his concurring opinion in Bottoson v. Moore, 833 So. 2d 693, 706 (Fla. 2002), "The Ring decision essentially holds that the Sixth Amendment right to trial by jury mandates that a jury make the findings of fact necessary to impose the death sentence, and conversely, the Sixth Amendment precludes the imposition of the death sentence when the responsibility for such fact finding is done by a judge, as it is in Florida." Section 921.141(3) Fla. Stat. (2007) requires a judge rather than a jury to make written findings that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. Thus Florida's sentencing scheme is unconstitutional. If Florida's sentencing scheme is found unconstitutional in Hurst, Jackson's sentence must be reversed.

ISSUE II

FLORIDA STATUTE SECTION 913.08(1)(a) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO MR. JACKSON. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT ADDITIONAL PEREMPTORY CHALLENGES AND FAILING TO GRANT CAUSE CHALLENGES WHEN WARRANTED.

Appellant relies on the argument in the initial brief regarding the constitutionality of the section 913.08(1)(a). Fla. Stat. (2007).

The trial court erred in denying cause challenges against potential jurors Fiore, Suarez, Russo, Spengler, and Hearne. A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. Busby v. State, 894 So. 2d 88 (Fla. 2004).

There is a reasonable doubt that Fiore possessed an impartial state of mind because she knew two people who were murder victims. Fiore said she was less shocked by the crime Jackson was charged with because she has worked through her experience. Clearly her friend being killed was weighing on her mind as she recalled that "tomorrow is the 14-year anniversary." To remember to the day something that occurred 14 years ago signifies that was a major event in her life that she has not forgotten. Fiore's answers were inconsistent. When asked if her past experience would affect her in any way she said absolutely not at all. Her actions belied that

statement as she did not even want to talk in front of the other jurors about the second incident where an acquaintance was stabbed 20 times and killed.

Fiore asked to approach the bench to talk about the incident involving an acquaintance versus being able to speak openly about her friend who was killed in a DUI. Fiore on one hand said she would not be affected and on the other hand said it would help her be more unbiased because she has seen both sides. Fiore did not mention how she saw both sides, only that she experienced friends being killed. She made no mention of friends being charged with crimes. It makes no sense that she didn't want to talk about the second crime because she had a little bit of stage fright after talking in open court about the first incident where her friend was killed. Finally Fiore did admit that she was going to have emotions but she said it wouldn't carry over. Yet she demonstrated in court that her emotions were carrying over by asking to approach the bench to discuss her second experience with the death of an acquaintance. Fiore's responses and actions created a reasonable doubt that she possessed an impartial state of mind. The trial court erred by denying a cause challenge on Fiore.

Silemy Suarez's aunt was the victim in a death penalty case. When Suarez initially talked about her aunt, Suarez said there is no doubt she could be fair and impartial. That afternoon Suarez

asked to approach the bench and said she was taken off guard when asked about the death penalty. Not so sure now, she said "I believe I'm a fair person and I think I could do this job even though my situation's kind of a little bit – you know." "Not the lawsuit but what happened with my aunt in that case. I can't just forget what happened to her and just not give this gentleman a fair chance either. It's not fair at all." Suarez, no longer positive, stated, "I think I could be objective and just concentrate on the evidence and other than that consider all the evidence and not just." (51/1688) When asked if she could be fair and impartial to both sides, Suarez could not answer positively like she did on her initial response. Suarez stated, "I believe so and I want to believe that, that would make me a good human being that I can do that you know just think about my personal feelings and situation. That's not – that be fair." (51/1691) "I'm pretty sure, yeah. I mean it's going to be hard." (51/1692)

Two days later, Suarez asked to approach the bench again and said she still felt the same way but her responses were not as sure as her initial response and said, "I feel like I could be impartial and fair." Obviously, Suarez was trying to convince herself because she knew it would be wrong not to be fair and impartial. After her initial positive response, Suarez began to question her ability and never once again positively said she

could be fair and impartial.

Suarez made the following statements which establish a reasonable doubt that she possessed an impartial state of mind because of the murder of her aunt. "It's not going to be easy." "I've been through it all week, you know, every day. So I've been – I think about it when I go home at night and I –but I don't – it's not the only thing I think about, you know." "You can't live in the past and you can't let those emotions affect your life because then I would be a victim the rest of my life, I can't think like that." "I believe things don't happen, you know, by coincidence. Somehow I was meant to be here. I don't know why or the reason why. But if this is what I need to do, this is what I need to do." "It's not like I'm eager to be on the panel or to be a juror I think, but I also wouldn't be a good person if I let my personal feelings about my situation not let me see clear about the evidence or whatever, give somebody else a fair trial because somebody else in my family. God wants to give them a fair chance." (54/2254-57)

Then the next day when asked if forensic evidence would be necessary or would strictly witnesses be enough, Suarez answered: "I expect that they have solid evidence to prove their case definitely not any kind of evidence light evidence for lack of a better word." When Suarez was asked what she meant by solid

evidence, she said: "They have evidence to convince us this person is guilty." (57/2666) By this statement alone, Suarez has negated the presumption of innocence. In considering a cause challenge, the court must look at the totality of a juror's responses. Where the totality of a juror's responses placed in doubt her ability to be impartial, she should be stricken for cause. Matarranz v. State, 133 So. 3d 473, 488 (Fla. 2013).

After making these statements there is no way Suarez could ever admit she could not be fair because by admitting she could not be fair, Suarez would be admitting she is not a good person and could not do what God wants her to do. When Suarez was talking about not living in the past she said "I can't think like that." She did not say I don't think like that. Suarez expressed how she should react, not how she does or will react. Although Suarez initially said she could be fair and impartial she subsequently equivocated and never regained her certainty. Obviously, when she volunteered to return to the bench she had doubts. Suarez was presenting this information to try to convince herself that she is a good person and could be fair and impartial in spite of having lived through her aunt's murder and reflecting on it every night of the trial. A juror that equivocates on her ability to deliberate in an unbiased manner should have been excused for cause. Id. at 95-96. Suarez's responses certainly created a

reasonable doubt that she possessed an impartial state of mind.

Jenifer Russo stated: "I used to always believe if you purposely murder someone, then I believe you should have the death penalty." When asked how she felt now, Russo replied "the same." (52/1812) Russo then changed her answer and said she would not automatically vote for death if a person had been convicted of premeditated murder. Russo's original response indicates she should have been excused for cause because "if any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause." Hill v. State, 477 So. 2d 553, 556 (Fla. 1985). Russo's initial response shows a bias that she had for the death penalty. A juror should be excused for cause where she initially admits unfitness to serve as an impartial juror and afterwards states she could be fair and impartial. Johnson v. Reynolds 121 So. 793, 796 (Fla. 1929). If there is any doubt as to the juror's sense of fairness or mental integrity, she should be excused for cause. The mind of the proposed juror should contain no element of prejudice for or against either party. Id. at 797.

For the same reasons Russo should have been excluded for cause, so should Kristopher Spengler have been excused for cause based on this response: "You know it's not the same in every case.

But just like when you asked everybody else if he was convicted in the first phase moving on to the second, of course you're going to lean – me personally, going to lean towards death penalty." (52/1815)

Olga Hearne also should have been excused for cause. Hearne's question to defense counsel indicated she did not presume Jackson to be innocent but rather she had a presumption of guilt. Hearne expressed her uneasiness of even being in the same room with Appellant when she asked if it was common for the jurors to have to face the person supposedly guilty of a crime. Although Hearne later said nobody is guilty until they prove it that does not change her initial belief that Jackson is supposedly guilty. "A prospective juror who cannot presume the defendant to be innocent until proven guilty is not qualified to sit as a juror." Kopsho v. State, 959 So. 2d 168, 172 (Fla. 2007). Hearne clearly stated that Jackson is supposedly guilty and although she indicated nobody is guilty until they prove it, she never indicated she presumed Jackson to be innocent. Her only indication regarding presumption of innocence was that Jackson is supposedly guilty. Consequently, Hearne should have been excused for cause.

Appellant has met the Trotter standard to show prejudice because he exhausted all of his peremptory challenges, asked for and was refused additional peremptory challenges, and indicated

three jurors that would have been excused if additional peremptory challenges were granted. Those three jurors sat on the jury and one of them was the foreman. Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990). The trial court denied additional peremptory challenges stating: "I'll abide by my rulings and respectfully deny the request for additional peremptory challenges, but you have perfected your record. If I'm wrong, I was wrong and if convicted, an appellate court will tell me so." (57/2722) The trial court was wrong in denying additional peremptory challenges. This Court should tell him so and grant Appellant a new trial.

ISSUE III

THE TRIAL COURT ERRED IN FAILING TO CONSIDER MR. JACKSON'S EVIDENCE OF BRAIN DAMAGE THROUGH qEEG TESTING AT HIS SENTENCING HEARING.

The trial court erred by excluding results of quantitative electroencephalogram (qEEG) testing from which Dr. William Lambos determined that Mr. Jackson had organic brain damage. Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923), dealt with the admissibility of a lie detector test during the guilt phase of a second degree murder trial. Since Appellant sought to introduce qEEG evidence at the Spencer hearing, a Frye determination should not have been used to exclude such evidence. The rules of evidence are relaxed

in the sentencing phase of the trial because the Constitution requires that "the sentencer in a capital case must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

Where the burden of proof to establish mitigation is by a greater weight of the evidence, it is improper to use the Frye test to exclude matters relating to any mitigating circumstance. The exclusion of Dr. Lambos' testimony based on qEEG results, violates section 921.141 Fla. Stat. (2007) regarding mitigating evidence which states: "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."

There is ample evidence that qEEG testing has been used to determine brain damage. In an unreported case in Hawaii, the Government has even advocated the use of qEEG testing and MRI scan to definitively prove Defendant's claim of brain damage. U.S. v. Williams, 2009WL424583 (D. Haw. 2009). Frye should not have been implicated here. When defense tried to exclude defendant's old IQ test scores and "Beta" tests used for screening, the court found the defense objections went to weight and not admissibility. Rodgers v. State, 948 So. 2d 655, 666 (Fla. 2006). Here the trial

court should have allowed Dr. Lambos testimony that Jackson had brain damage based on his findings from qEEG testing, and any objection the State had went to the weight of the evidence not the admissibility. The importance of Porter v. McCullom, 130 S. Ct. 447, 455 (2009) is that Dr. Dee's testimony regarding the existence of a brain abnormality should not have been discounted entirely because of the State's perceived problems with the tests Dr. Dee used. Any perceived problems with testing should go to the weight of the evidence not its admissibility when it is presented as mitigation in penalty phase.

Even though Frye should not have even been a consideration in penalty phase, it was incorrect as a matter of law to exclude qEEG testing. Appellant agrees with Appellee that the correct standard of review is de novo. Brim v. State 695 So. 2d 268, 274 (Fla. 1997). Brim quotes language from Justice McMorrow of the Supreme Court of Illinois who wrote in a special concurrence:

> There are good reasons why the determination of general acceptance in the scientific community should not be left to the discretion of the trial court. Foremost is the fact that the general acceptance issue transcends any particular dispute. As one court put it, "[t]he queston of general acceptance of a scientific technique, while referring to only one of the criteria of admissibility of expert testimony, in another sense transcends that particular inquiry, for, in attempting to establish such general acceptance for purposes of the cases at hand, the proponent will also be asking the court

> to establish the law of the jurisdiction for future cases." Jones v. United States, 548 A.2d 35, 40(D.C. App.1988). Application of less than a de novo standard of review to an issue which transcends individual cases invariably leads to inconsistent treatment of similarly situated claims.

People v. Miller, 670 N.E.2d 721, 739 (Ill. 1996)(McMorrow, J., specially concurring).

The trial court should have found that qEEG is generally accepted in the particular field in which it belongs because qEEG testing has been admitted in an 11th Circuit trial court in Florida, and other courts throughout the United States. See Estate of Cleveland v. Heritage Properties, Inc., 150 So. 3d 735, 741 (C of App Miss. 2014); Sellers v. Ward, 135 F. 3d 1333, 1337 (10th Cir. 1998); Valdez v. State, 46 P. 3d 703, 706 (Okla. Crim. App. 2002). In a case in Hawaii the government argued that: "Dr. Young failed to conduct crucial tests that have a significant impact on the reliability of her overall methodology. (Gov. Closing Arg. At 30-32.) Specifically, the Government argued that Dr. Young failed to conduct a functional MRI scan and a qualitative EEG ("QEEG") on Defendant's brain that could have the potential to definitively prove or disprove Defendant's claim of brain damage." U.S. v. Williams, 2009WL424583 at 5.

In addition, in its written order denying the admission of qEEG testing, the trial court failed to recognize that the United

States military, Department of Defense, and Department of Veteran's Affairs, use qEEG. As indicated in Dr. Thatcher's affidavit QEEG is used in several VA Medical Centers for the broad spectrum of psychiatric and cognitive consequences of traumatic brain injury. (8/1338) If the trial court had allowed the testimony of Dr. Lambos regarding his findings aided by the qEEG testing, the trial court could have found and given great weight to the two statutory mental mitigators that Jackson's ability to conform his conduct to the requirements of the law or appreciate the criminality of his conduct was substantially impaired and Jackson was under the influence of extreme emotional or mental disturbance at the time the capital offense was committed. This was not harmless error. Such a finding could have created the necessary mitigation to outweigh the two aggravating circumstances in this case and caused the judge to impose a life sentence.

ISSUE IV

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. JACKSON'S MOTION FOR MISTRIAL AFTER A KEY STATE WITNESS INFERRED THROUGH HER TESTIMONY THAT MR. JACKSON "HAD JUST BEEN RELEASED" FROM PRISON AND WAS UNRESPONSIVE IN HER TESTIMONY.

This error was highlighted when shortly after defense counsel voiced his objection at the bench, the trial judge had the jury

removed from the courtroom. This appears to be the only time during the testimony of O'Neal that the jury was removed from the courtroom. This certainly brought added attention to O'Neal's damaging statement in response to the prosecutor's question of how long Jackson lived with her prior to September 13, 2007. O'Neal responded: "I believe he was released—."

Appellee contends that without any context at all, the jury had nothing from which to infer Appellant had been released from prison. The context is that Appellant was on trial for first degree murder and three other charges. During the State's opening statement it was indicated that Jackson moved back to town several weeks before the murder. (58/2794) During voir dire a juror questioned if Mr. Jackson was in custody. Another juror asked if it was typical to have a supposedly guilty person sitting in front of the prospective jurors. The jury learned Jackson came to live with O'Neal and her husband after he had been released. As defense counsel noted he objected before O'Neal could say "from prison" after she said he was released, but there is little room for speculation as to what she was going to say. Certainly in this context the jurors must have filled in the word "prison" because that is the only word that would make sense. There was no reason for the jurors to believe Jackson was in the hospital or the

military and the more common terminology if he was exiting either one would have been discharged, not released.

The trier of fact should always focus on a defendant's guilt or innocence of the crime charged and should not be diverted by unrelated matters. Craig v. State, 510 So. 2d 857, 863 (Fla. 1987). In this case, the jury was left to speculate that Jackson had just been released from prison and moved in with O'Neal just prior to the murder. The evidence that Appellant was just released suggests he had been convicted of prior crimes, which was irrelevant and only showed Appellant's bad character and propensity to commit crime. Such evidence is unfairly prejudicial and must be excluded. Castro v. State, 547 So. 2d 111, 114-15 (Fla. 1989); Peek v. State, 488 So. 2d 52, 55-56, (Fla. 1986). The improper admission of collateral crime evidence is presumed harmful because the trier of fact might take the bad character or propensity to commit crime as evidence of guilt of the crime charged. Id. at 56. Testimony of other bad acts may be admissible if relevant to prove a material fact in issue, but is inadmissible when the evidence is relevant solely to prove bad character or propensity for misconduct. Williams v. State, 110 So. 2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959). Such evidence is presumptively harmful because of the danger that the jury will take the bad character or propensity to commit crime as evidence

of guilt of the crime charged. Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). The evidence of other crimes or bad acts is inadmissible, and its introduction harmful and reversible error. Appellant is entitled to a new trial.

The trial court stated that if O'Neal had said "released from prison" they would be starting this trial for the third time, meaning he would have granted the motion for mistrial. In the context of this trial and considering the totality of O'Neal's comment, the only reasonable result is that the jury concluded Jackson had been released from prison or jail. Where the jury learns of a defendant's prior incarceration, even by implication, he is entitled to a new trial. Turner v. State, 51 So. 3d 542 (Fla. 5th DCA 2010). In Turner a motion to strike the jury panel was made after a prospective juror said she knew defendant because she was a former correction officer at the Marion County Jail. The motion was denied. Turner's conviction was reversed and remanded for a new trial. Id. at 543.

Appellee relies on Fletcher v. State, 168 So. 3d 186 (Fla. 2015) for the proposition that even where a jury learns of a defendant's prior imprisonment it must be evaluated in context and does not always require reversal. One of the charges Fletcher was being tried for was escape and Fletcher stipulated that he was in lawful custody prior to the escape. So the brief statements were

not so prejudicial to vitiate the entire trial. Id. at 208. Unlike Fletcher, until O'Neal blurted out her comment, the jury had no idea that Jackson had previously been incarcerated. The prejudicial impact here was more like in Turner where the case was remanded for a new trial when the jury learned by implication that Turner had previously been in jail.

ISSUE V

MR. JACKSON WAS DENIED A FAIR TRIAL WHEN THE PHOTOGRAPHS OF THE DEAD BURNED VICTIM WERE ADMITTED INTO EVIDENCE BUT WERE NOT RELEVANT TO PROVE ANY MATERIAL FACT IN DISPUTE AND THE INJURIES WERE POST-MORTEM.

The photographs of the victim were not admissible because they were not relevant to prove any material fact in dispute. The only fact in dispute was who killed the victim. Appellee relies on Boyd v. State, 910 So. 2d 167, 191 (Fla. 2005) for the proposition that autopsy photos that are difficult to view are admissible to the extent that they fairly and accurately establish a material fact and are not unduly prejudicial. The autopsy photographs were admitted in the penalty phase of Boyd, not the guilt phase, because they were relevant to assist the medical examiner in describing the manner of death and proving the HAC aggravating factor. The photographs of the burned victim in the present case were extremely gruesome, unduly prejudicial, and were not relevant

to prove any material fact in dispute.

The present case is similar to Hertz v. State, 803 So. 2d 629 (Fla. 2001) where this Court found that it was error to admit gruesome photographs showing the effects of fire which occurred after the victim's death, because the photographs were not relevant to any issue in dispute. Id. at 643. Likewise, in the present case, the objected to photographs were not relevant to any issue in dispute. In Hertz, the improperly admitted photographs were found harmless because they played a minor role in the State's case, where there was direct evidence implicating Hertz, corroborated by physical and testimonial evidence. The improper admission of the objected to photographs in Jackson's case was not harmless, because of the extremely gruesome nature of the evidence. There was primarily circumstantial evidence along with the testimony of inmates with multiple convictions who alleged that Jackson confessed to them. There were no eyewitnesses to any of the alleged crimes. Although Jackson's DNA was found on the victim it could have been placed there up to five days prior to the murder.

Photographs of a deceased must be relevant, and in order to be admissible, must be probative of an issue that is in dispute. Almeida v. State, 748 So. 2d 922, 929 (Fla. 1999)(emphasis in opinion). In the present case, the gruesome photos did not prove

any material fact that was in dispute. Appellee argues the photographs showed the victim's injuries, revealed the damage caused to the victim's remains, and showed destruction of evidence of the crimes. None of which were issues in dispute. Appellant was not charged with destruction of evidence. As stated by Appellee; "The only disputed issue in this case with respect to Tran's murder was the identity of her killer." (AB, 92)

In Almeida, the medical examiner testified the photo was relevant to show the trajectory of the bullet and the nature of the injuries. Since neither issue was in dispute, the photo was gratuitous. Id. at 930. In the present case, cause of death or the nature of the victim's injuries was not in dispute. The only issue in dispute was the identity of the perpetrator of these crimes. The photos admitted in the present case were extremely gruesome because they showed the charred remains of the victim. The prosecutor utilized six photographs which were objected to, Q3-6, Q9 and Q10, which were irrelevant to any issue in dispute. The gruesome nature of these photographs was highlighted when displayed on a large screen television.

The State argues that the gruesome photos had no impact on the excused jurors, but we can't know that for sure. Arguably the photographs had such an impact on two jurors that they were no longer able to continue to perform their duty as jurors, because

it was only after being exposed to the photographs that the jurors brought up their concerns and had to be replaced by alternate jurors.

The State cites Henderson v. State, 463 So.2d 196, 200 (Fla. 1985) for the proposition that "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments" (AB, 70). The same sentiment was conveyed in Calloway v. State, 189 So.2d 617,620 (Fla. 1966)(defendant cannot complain of the shocking nature of photographs on ground of gruesomeness "inasmuch as the scene was one he created"). However, this gut reaction does not trump the relevancy standard of Almeida, that photographs, to be admissible, must be relevant to an issue that is in dispute. Even more importantly, the "work product" and "scene was one he created" cases illustrate just how prejudicial gruesome photos can be in a case like this one, where the only disputed issue is identity. The "work product" concept assumes the defendant's guilt, and is flagrantly inconsistent with the presumption of innocence. The horrendous photographs almost inevitably create feelings of anger, revulsion, and pity, and a desire to punish the person responsible for causing such suffering. And the defendant is the only person on trial. Whatever the validity of the "work product" rationale in a case where the defense is, for example, insanity, self-

defense, or lack of premeditation, it is clearly an improper basis for the introduction of gruesome photographs when the sole defense is that the accused was not the person who committed the crime. If the photographs are shown to be relevant to a disputed issue (which would often be true in a case where the defendant claims self-defense, accident, or lack of premeditation, because the nature of the victim's injuries would shed light on what occurred), then they would be admissible under the relevancy standard, even apart from the "work product" theory. In the instant case, in contrast, there is no disputing what happened to this woman and how she died. What is in dispute is who did it.

Appellee cites to Jackson v. State 545 So. 2d 260, 265 (Fla. 1989) where the adult victims died of gunshot wounds while the child victims died of smoke inhalation. Photographs of the charred victims' remains were properly admitted because "these photos were relevant to prove [the victims'] identity and the circumstances surrounding the murders and to corroborate the medical examiner's testimony." Although the photographs were properly admitted in Jackson, they were not relevant in the present case because there was a stipulation as to the victim's identity and there was no dispute as to cause of death. Appellee also suggests the photos were relevant to show defensive wounds. There was only one possible defensive wound which was not in dispute, so if relevant

at all, its sole relevance would have been to prove HAC in the penalty phase.

Appellee suggests that "to the extent Appellant finds fault with the medical examiner's testimony concerning the photographs, he did not object below." (AB, 73, 74) Appellant clearly objected to the admission of the photographs showing the burned victim and argued they were irrelevant because they showed post-mortem activity which did not contribute to the cause of death. The judge made his ruling that the photographs were relevant to some extent and relevant to establish what the offender did with the body by burning and destroying it. Defense counsel is not required to continue to make futile objections once the court has ruled. See Donaldson v. State 369 So. 2d 691, 694 (Fla. 1st DCA 1979); Thompson v. State, 615 So. 2d 737, 744 (Fla. 1st DCA 1993). Defense counsel preserved the record by filing motions in limine before trial to limit the admission of photos of charred remains and objecting at trial to the admission of photos of the burned victim. Once the trial court ruled the photos were admissible, it would have been futile for defense counsel to object to the medical examiner explaining what was depicted in the photographs.

The photographs were undeniably graphic and difficult to view. The photographs in this case were not relevant to any issue in dispute, and even where photographs are relevant the trial

court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990). It cannot be said beyond a reasonable doubt that the photographs had no impact on the trier-of-fact and did not affect the verdict. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). It was error not to exclude the gruesome photos because they were irrelevant and the prejudicial impact outweighed any potential probative value.

ISSUE VI

THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR WAS INAPPLICABLE AND INSUFFICIENTLY PROVED. IT SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY OR RELIED ON TO SUPPORT MR. JACKSON'S DEATH SENTENCE.

Appellee cites to Welch v. State, 992 So. 2d 206, 215 (Fla. 2008) for the proposition that a trial judge is required to instruct the jury on all aggravating and mitigating factors when credible and competent evidence of such has been presented to the jury. The credible and competent evidence presented in the instant case tended to prove that the sexual battery was cold, calculated and premeditated, but not the murder. The premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of CCP. Smith v. State, 28 So.

3d 838, 867 (Fla. 2009)

All of the factors Appellee lists as competent evidence to support the cold, calculated, premeditated jury instruction go to show premeditation of the sexual battery but not the murder. There was no evidence as to why the van was stolen. It is pure speculation that van was stolen in order dispose of evidence. That is what subsequently occurred, but there was no evidence to suggest that was pre-planned. The only evidence presented as to why the killing occurred was Gonzalez' testimony that Jackson said "she started going crazy and wild; screaming. So he stabbed her in the throat." This evidence, presented by the State's own witness, shows the killing was prompted by panic. To support the CCP aggravator the killing must be the result of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage, and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident and he had heightened premeditation to kill, and he had no pretense of moral or legal justification. Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994). The credible competent evidence, presented by the State, shows the killing was a spur of the moment frenzied response to the victim going "crazy and wild" and does not justify the presentation of the CCP instruction to the jury.

The State argues that there was heightened premeditation

because Appellant had the opportunity to leave the crime scene and not commit the murder, citing to Alston v. State, 723 So. 2d 148, 162 (Fla. 1998). In Alston, the defendant had ample opportunity to release the victim after the robbery, but instead after substantial reflection, Alston acted out the plan that he developed during the extended period of time the events happened. In the present case, the evidence only points to murder being the result of panic due to the victim going wild and crazy and not the result of any thought out plan.

It is impossible to say the jury's consideration of the CCP aggravating factor was harmless beyond a reasonable doubt, where the jury considered three aggravating factors compared with numerous mitigating factors. One juror voted for life, and therefore must have found that the mitigating factors outweighed the aggravating factors. If the jury had considered only two aggravators instead of three it is likely more jurors would have found the mitigators outweighed the aggravators. The trial court found one statutory and 13 non-statutory mitigating factors. The trial court found CCP was not proven beyond a reasonable doubt. That alone would not foreclose the jury instruction on CCP, but given that there was not competent substantial evidence presented to justify giving the CCP instruction it was error to instruct the jury on this aggravating circumstance. This was not harmless

because it can't be said beyond a reasonable doubt that the jury considering the CCP aggravating factor did not affect their verdict. It is impossible to conclude beyond a reasonable doubt that had the jury only considered two aggravating factors against the voluminous mitigation that more jurors would not have found that the mitigating circumstances outweighed the aggravating factors and recommended a sentence of life. DiGuilio at 1139.

Because of the significant weight that has historically been given to CCP, which along with HAC is one of the two most serious aggravators, it cannot be said beyond a reasonable doubt that the penalty phase jurors' improper consideration of CCP did not contribute to the recommended sentence of death. Perez v. State, 919 So. 2d 347, 382 (Fla. 2005). This Court in Perez, determined that HAC was erroneously applied to Perez and then determined it was not harmless error. Although Perez dealt with improper consideration of HAC, the same reasoning should apply to CCP. This case should be remanded for a new penalty phase proceeding. Id. at 381, 382.

ISSUE VII

THE TRIAL COURT ERRED IN ALLOWING IMPROPER REBUTTAL TESTIMONY FROM THE STATE'S WITNESS IN PENALTY PHASE.

Appellant relies on the argument set forth in his initial brief for this issue.

ISSUE VIII

THE DURING THE COURSE OF A FELONY AND HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATING FACTORS ARE UNCONSTITUTIONAL.

Appellant relies on the initial brief for the "during the course of a felony" aggravator.

Appellee contends that Appellant waived the argument that the trial court erred in finding his actions were HAC because it was not raised as a separate issue and there was no supporting argument. The initial brief clearly points out that there was no other evidence of shocking or vile behavior other than the burning of the body. The argument was further developed by quoting the medical examiner that the victim lived "probably seconds to several minutes depending on the circumstances." A finding of HAC cannot be based on the mere possibility that the victim may have suffered extreme pain or mental anguish. See Brown v. State, 644 So.2d 52, 53 (Fla. 1994)(medical examiner's testimony that

victim had been stabbed 3 times and none of the wounds was immediately fatal held insufficient to prove HAC); Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996)(speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field insufficient to support HAC).

This Court has rejected the HAC factor in beating deaths where the victim may have been rendered unconscious after the first blow. See Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1998)(trial court erred in finding HAC where medical examiner's testimony established that victim may have been rendered unconscious upon receiving first blow from the crowbar); Elam v. State, 636 So.2d 1312, 1314 (Fla. 1994)(trial court erred in finding HAC where medical examiner testified attack took place in a very short period of time and victim was unconscious at end of this period). If the victim loses consciousness quickly and does not suffer for more than a very short period of time there is insufficient evidence to support a finding of HAC. If the victim in this case was conscious for only seconds after the first knife wound, HAC was improperly found.

The cases Appellee cites to support a finding of HAC are distinguishable from the present case. HAC was upheld in Francis v. State, 808 So. 2d 110, 134 (Fla. 2001) where the victim was

repeatedly stabbed. In Francis, there were two murder victims stabbed numerous times in close proximity with each other which contributed to the finding of HAC. In addition, one victim who was stabbed twenty three times had no defensive wounds, but the other victim stabbed sixteen times did have defensive wounds. In Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997), although the victim was only conscious for thirty to sixty seconds after the knife attack, she sustained defensive wounds on her arms, duct tape was placed over her mouth, and he continued to stab the victim as she fought and tried to fend of blows. The one possible defensive wound in the present case does not indicate the victim suffered for a long period of time or remained conscious for more than a few seconds.

In Peavy v. State, 442 So. 2d 200, 202 (Fla. 1983) we only learn of the facts in the dissenting opinion (the victim lost consciousness within seconds and bled to death in a minute or less, no defensive wounds, no struggle, and the trial court appeared to have relied on what was done to the body after death). Perhaps Justice McDonald's dissent was correct that this kind of misconduct exhibited here does not warrant a finding of HAC.

In Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982), this Court reversed a finding of HAC where the killing was done by

bludgeoning with a heavy, sharp tool and the defendant tried to conceal the product of his premeditated murder by an unsuccessful attempt to burn the body of the victim in the victim's truck. The killing in the present case did not rise to the standard for HAC as set forth in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973):

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

There was nothing unnecessarily torturous to the victim in the present case because the victim was deceased before being burned. There was testimony from the medical examiner that the victim could have lost consciousness in a matter of seconds and there was one injury to the hand that was possibly a defensive injury. There was not competent substantial evidence presented to prove beyond a reasonable doubt that this was a torturous murder exemplified either by a desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Kearse v. State, 662 So.2d 677, 686 (Fla. 1995). The trial court indicated that the victim was conscious and fought during the sexual assault. That alone does not show that she anticipated her death as there was no evidence that Appellant planned to kill the

victim. The victim's death occurred as Appellant panicked when the victim went crazy and started to scream.

The trial court also misinterpreted the medical examiner's testimony to conclude that the victim remained conscious for several minutes after the slicing neck wounds. The trial court's order stated:

> The evidence adduced through the medical examiner demonstrated that Cuc Tran suffered several stab wounds to her body and slicing wounds to her neck, caused by a knife or other sharp object, which severed her jugular vein. She opined that as a result of the slicing neck wounds that also injured her vocal cords or larynx, she would have lost her ability to scream, and that she would have remained conscious for several minutes before losing consciousness.

(17/3039)

The medical examiner actually testified that the victim sustained four stab wounds and two incised wounds, all to the neck. There was no testimony that there were stab or incised wounds in parts of the body other than the neck. After these wounds the victim would have remained conscious probably seconds to several minutes. (62/3343) The medical examiner believed these six wounds were inflicted at the same time. The victim would have died in seconds to minutes, but probably more like minutes. She would have lost consciousness prior to death. (62/3345) The trial court ignored the testimony that the victim would have lost consciousness in probably seconds and instead focused on the part

referring to several minutes. There was no competent substantial evidence to support the position that the victim remained conscious for several minutes rather than seconds.

As argued in the initial brief the HAC aggravator is unconstitutional because it is not applied consistently. The killing in the instant case was quick as all six wounds occurred at the same time, there was only one possible defensive wound and the victim lost consciousness probably in seconds to several minutes. This is certainly less torturous than what occurred in Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), where the finding of HAC was overruled. In Bonifay, the store clerk was shot twice in the body and then lay on the floor begging for his life talking about his wife and children. Bonifay then told the victim to shut up and shot him twice in the head. Id. at 1311. Because this Court could not determine what effect the finding of HAC had in the sentencing process, the case was reversed and remanded for a new sentencing proceeding.

In Mr. Jackson's case, the trial court improperly found the existence of the HAC aggravating factor. This case should be remanded for a new penalty phase.

ISSUE IX

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL

For this issue, Appellant relies on his argument set forth in the initial brief and the argument in ISSUE I of this reply brief.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, on this 25th day of November, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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