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IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Case No. SC13-1550
L.T. No. 2010-CF-000479AX
Death Penalty Case

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR MANATEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On August 3, 2009, Kathleen Briles was brutally murdered in the living room of her home in Terra Ceia, Florida (V12/1963, 1972-73). Her husband, Dr. James Briles, found her body when he came home from work in the early evening (V12/1966, 1972-73). Kathleen's car was parked in the driveway and had grocery bags in the trunk which contained perishable items (V12/1970; 2046). The car was in the place where Dr. Briles usually parked his truck, which was unusual because it was farther away from the back door, where Kathleen would have normally taken in the groceries (V12/1970).

Dr. Briles noted that the house was unusually dark and very quiet; he had to unlock the back door to get inside, and the dog was acting anxious (V12/1972). He discovered his wife's body on the floor of their living room. She was bound and gagged, and he knew she was dead; she was cold, had no pulse, and her jaw and head had been deformed (V12/1972-73). Near her head was a 23-pound antique sewing machine that normally was kept in another room, with broken parts scattered nearby (V12/1973, 2030-32; V13/2098). The medical examiner determined from the numerous fractures that the sewing machine was thrown down onto the back of her head at least eight times, resulting in her death by blunt force trauma (V13/2116-19, 2123-31). Various other recent

external and internal injuries were also noted at the autopsy (V13/2109-14, 2119-23).

The Briles' home was in disarray, with furniture moved and drawers open; someone had rummaged through their belongings, and all of Mrs. Briles' jewelry was gone, even the wedding ring from her finger (V12/1979-96, 2005-07, 2063). Her husband estimated the total value to be $30,000 to $40,000 (V12/1996). Among the missing property were several unique items, linked directly to Appellant Delmer Smith shortly after the murder, including a necklace, a watch, a Minnie Mouse keychain, a padlock key holder, a special set of nickel coins, and a medical encyclopedia (V12/1997-2005; V13/2229-31; V14/2299-2305).

Family members positively identified a diamond baguette necklace, pawned the day after the murder, as belonging to Mrs. Briles (V12/1997; V14/2299-2300; V15/2496-98). The necklace was pawned by James Cellecz, an acquaintance of Smith (V15/2480-81). Cellecz testified that Smith asked him to pawn the necklace and some other jewelry which, according to Smith, belonged to a mutual friend, because Smith had forgotten his identification (V15/2480-82).

After Smith was arrested, he placed a few urgent calls to Martha Tejeda, insisting that she go to his storage unit and remove his large duffle bag, and not to tell the police

(V13/2158-60, 2171-2222). She put the bag up in her attic, and later turned it over to the police, with everything still inside it (V13/2161-64). There was a small safe inside the bag, and inside the safe police found the Minnie Mouse keychain, the coin set, the gold padlock, and the watch (V13/2229-31).

The Mickey Mouse keychain was a limited edition piece from a specialty collection boutique in California which Dr. Briles had given Mrs. Briles on their anniversary in June, 2009 (V12/1998-2000; V13/2246-56; V14/2301-02). When found in Smith's bag, it had additional keys which were later found to operate the car which Smith drove in August, 2009 (V13/2231; V14/2307-11). Michele Quinones testified that she was Smith's girlfriend at that time and that Smith had given her a set of keys to his car on the Minnie Mouse keychain (V14/2331).

The medical encyclopedia, which Cellecz had seen in Smith's car the day after the murder, was also among Smith's property at Tejeda's house (V13/2164, 2236-37; V15/2483-84). A fingerprint identified as Smith's left index finger was noted on a page inside the book (V12/2033, 2035; V14/2280, 2283). The Briles' son identified the book as the same one he had borrowed from his mother; he recognized the way the cover was creased and the pages were frayed (V13/2264-66).

Smith also was known to carry a bag with a mask, gloves,

and standard gray duct tape (V14/2332-33; V15/2483). Mrs. Briles' neck, wrists, and ankles had been bound with duct tape (V12/1972, 2064; V13/2098). There was apparent ridge detail from a fingerprint found on the tape (V12/2068-70). Although this print did not belong to Smith, investigators learned that during the tape-making process, ungloved plant employees touch the tape as it is produced, and therefore unidentified prints on a roll of duct tape do not necessarily suggest a different perpetrator (V12/2075-78; V13/2079-89).

Surveillance cameras captured Mrs. Briles' at a Publix grocery store in Palmetto, Florida, the afternoon of her death (V12/1957-58). Her car is seen leaving the parking lot and headed north at 3:38 p.m. (V12/1960). Her home was in that direction, approximately six-and-a-half minutes from the store (V14/2306).

Cell phone towers recorded the presence of Smith's cell phone very near to the Briles' home about 3:44 p.m. on August 3, 2009 (V14/2408). A call of about six seconds came in to Smith's cell number, but it was not answered (V14/2418). Other calls and messages transmitted to Smith's phone that day reveal that about an hour before and an hour after the 3:44 call, the phone was communicating with towers further south, near Smith's residence in North Port, in Sarasota County (V14/22404-12).

A number of individuals that had attempted or exchanged phone calls or text messages with Smith on or about August 3 testified that they did not recall ever calling Smith's number or getting a call from that number when someone else was one the other end of the phone (V14/2331, 2346, 2445; V15/2511-12, 2521, 2534-35, 2539, 2543). James Cellecz testified that he never used Smith's cell phone outside of Smith's presence; he did not know many of the individuals that had contact with Smith's phone on August 3, 2009, and they did not know him (V14/2477-78; V15/2484, 2486, 2502-03, 2506, 2512, 2515, 2519, 2521, 2535, 2540, 2543). Cellecz also testified that he did not break into Mrs. Briles' house and kill her (V15/2490).

Joshua Hull was living in the Manatee County Jail in April, 2010, and saw Smith at a court hearing around that time (V14/2447-49). Returning to jail on the transport bus, Hull joined in a conversation about motorcycles between Smith and another inmate (V14/2449-50). Smith asked Hull where he lived and if he knew James Cellecz, who lived in the same housing unit (V14/2450). Hull responded that he did and Smith asked Hull to tell Cellecz that Smith "had something" for Cellecz's "ass," and that he still knew where Stephanie and Gavin were and Smith "had something" for them as well (V14/2450-51). Hull explained that Stephanie and Gavin were Cellecz's wife and child, and that

Smith said he was upset because he had given jewelry to Cellecz to pawn and that Cellecz was snitching on him (V14/2451). Hull told Cellecz about the threat and later law enforcement came to Hull to confirm the exchange; Hull sought favorable treatment for his assistance, but was not provided with the benefit he sought (V14/2448, 2457-65).

The jury convicted Smith as charged (V15/2652). At the penalty phase, the State presented evidence that Smith had prior violent felony convictions and that Smith was on felony probation at the time of the murder. Specifically, Smith was convicted of armed bank robbery and carrying a firearm during a crime of violence in 1995; he was released from federal prison and was placed on felony probation on September 16, 2008 (V16/2684, 2686-90).

In addition, on March 14, 2009, Smith committed a home invasion in Sarasota (V16/2692-2705). The victim of that offense, Nicole Mitchell, testified that Smith entered her home about 10:00 p.m., wearing gloves and a mask (V16/2694-98). He pushed her down on the couch and showed her a gun, threatening to kill her if she kept screaming (V16/2696-97). He grabbed her face so that she couldn't breathe and tore her lip (V16/2698). He marched her through the house looking for valuables (V16/2699). He took a computer and a TV and apologized before

binding her with electrical cord; he tied her hands and feet behind her with the cord wrapped around her neck in such a way that, if she moved her legs, she would strangle herself (V16/2700-02). Smith left and Mitchell ultimately got herself free (V16/2703). Mitchell testified against Smith at a trial and he was convicted of home invasion robbery and kidnapping (V16/2704).

The State also presented brief victim impact testimony from Mrs. Briles' sister, Diane Brinker, and from her husband, Dr. James Briles (V16/2707-12).

The defense presented testimony from Smith's two nieces, Alicia Phillips and Christina Smith (V16/2721-34). Both women described how Smith provided guidance to them and encouraged them to stay in school and out of trouble (V16/2725, 2727, 2732-34). Ms. Phillips grew up in the same house where Smith lived until he went to prison when she was about ten or eleven; Ms. Smith lived in the same house but was too young to remember when Smith lived there (V16/2722-23, 2730-31). There was love in the family and even while Smith was in prison they visited and communicated with him regularly (V16/2722-24, 2726-27, 2731-33).

The defense also presented expert testimony from neuropsychologist Dr. Hyman Eisenstein (V16/2735-85). Eisenstein evaluated Smith on several occasions and reviewed many

background documents and materials (V16/2737-43). According to Eisenstein, Smith suffers profound, unequivocal brain damage, as well as Attention Deficit Disorder and Intermittent Explosive Disorder [IED] (V16/2745, 2747, 2749, 2766, 2784-85). Eisenstein also testified that Smith met the criteria for Antisocial Personality Disorder [APD], but Eisenstein did not diagnose Smith with APD because he felt that Smith's entire picture was better explained with neurological tests and the IED diagnosis (V16/2753).

Eisenstein noted a series of tests and reports conducted when Smith was about 14 or 15 years old, which reflected that he had repeated second, third, fourth and fifth grade, so he was 14 years old in fifth grade and five years behind (V16/2743-44). Smith was then promoted from the fifth to the ninth grade and put in special education classes in the Detroit school system (V16/2744). At that time, intelligence testing showed Smith's full scale IQ to be 75, with a verbal score of 70 and a performance score of 86 (V16/2745). The report also indicated Smith had Attention Deficit Disorder, which was virtually unknown in 1986 and never treated (V16/2745).

Eisenstein's intelligence testing revealed improvement, with a full scale score of 89, verbal score of 80, and performance score of 96 (V16/2749). Eisenstein explained that

the increase was due to self-improvement efforts Smith undertook while in federal prison, taking classes and working hard (V16/2748-49).

Although Ms. Phillips testified that she was not aware of any abuse in their home, Eisenstein testified that a report indicated Smith had been physically and emotionally abused by both parents, and there was sexual abuse by Smith's father (V16/2723, 2746). Eisenstein opined that the objective data showed Smith's frontal lobe and executive functions were impaired (V16/2749-50). The damage manifests as perseveration, meaning Smith gets "stuck" on one thing and has trouble changing track to come up with a new idea or solution (V16/2752). According to Eisenstein, Smith's impairment put him in the lower 2% of the population with regard to decision making and the ability to process (V16/2750). Eisenstein could not identify any particular source, but suggested that the damage could be from a combination of factors; he stated it was hard to know what trauma Smith's brain had suffered, noting that Smith had been involved in a motorcycle accident and suffered a contusion prior to Mrs. Briles' murder (V16/2750).

Eisenstein testified that Smith's prison records reveal that his behavior while incarcerated was excellent; there were no significant problems, and very few infractions over a long

period of time, with no major violence (V16/2754). Eisenstein explained that since prison is a controlled environment, Smith's lack of impulse control was not an issue (V16/2755).

Eisenstein felt that the violence against Mrs. Briles was not planned (V16/2755-56). He acknowledged that the use of gloves and disguises suggest that Smith engaged in some planning of the robbery, but he testified the planning was not sophisticated (V16/2755). Rather, he described the planning as "impulsive" and stated it was more along the lines of Smith being proactive about not being caught in unlawful activity and not really "planning" (V16/2756). The violence, however, was described as unexpected, very impulsive, and not thought out ahead of time (V16/2756). According to Eisenstein, the violence occurred because Smith, when confronted with his situation, was unable to leave due to his frontal lobe problems and he then just reacted to a bad situation (V16/2756).

Eisenstein testified that Smith was in denial about his mental problems and wanted to come across as normal (V16/2759-61). He recommended that Smith be subjected to further testing, such as an MRI or a PET scan, which may show abnormalities in Smith's electrical activity indicating brain impairment (V16/2758). He opined that both statutory mental mitigating factors applied in this case (V16/2785).

On cross examination, Eisenstein admitted that, of the death row inmates he's evaluated, 90 to 95% have mental illness and/or brain injury (V16/2765). He acknowledged that the medical records from the motorcycle accident in July 2009 showed that Smith's CT scan was normal, there was no fracture or disease and Smith was not admitted to the hospital at that time; this was the only documented head trauma in the records Eisenstein reviewed (V16/2779-80). The State wanted to ask Eisenstein about a record he relied on detailing how Smith raped and robbed a woman at a car wash when he was 14 years old, asserting that the offenses involved planning and executive functioning, but the court sustained the defense objection that the prejudicial impact of this evidence outweighed the probative value, even if the State only discussed the robbery aspect and not the sexual component of the crime (V16/2771-78).

In rebuttal, the State presented psychiatrist Dr. Wade Myers (V16/2791-2814). Myers examined Smith's mental functioning and reviewed school, medical and prison records, concluding that Smith's brain functioned in the average range, with no indication of brain damage (V16/2796-97, 2812-13). Myers diagnosed Smith with Antisocial Personality Disorder and noted that Smith's prior prison records do not support the claim that Smith had poor impulse control but, to the contrary, Smith was

well in control of his desires and impulses (V16/2800-02). Myers observed that Smith participated in team sports while in prison, which often leads to fighting among players, yet Smith's prison record was reasonable, showing good adjustment to prison with no DRs (V16/2802-03). The prison records included mental health records and repeatedly documented that Smith did not have a mental disorder, mental illness, or mental disability (V16/2803). At one point in the 1990s Smith was apparently depressed over the death of a family member, but it was considered typical grief and he was not treated or given any medications even at that time (V16/2803). Smith's medical records reflect that Smith was never previously diagnosed with Intermittent Explosive Disorder or any brain damage (V16/2804).

Myers testified that Attention Deficit Disorder exists in about 5% of the population, and more in children (V16/2804). It typically involves an inability to pay attention or stay in your seat and people with ADD may lose things or do impulsive things, but it is not an extreme mental or emotional disorder (V16/2804). The TOMM test which Eisenstein gave to Smith measures your memory as well as how well you pay attention, and Smith did well on that test (V16/2805).

Myers noted that the intelligence testing conducted by Eisenstein was properly scored and placed Smith in the average

range (V16/2806). Although this was higher than the test Smith took when he was 14, IQ scores are generally stable over one's life, and it was possible that Smith simply didn't put forth full effort at the earlier testing (V16/2806).

When Myers met with Smith two days before testifying, Smith cooperated with the evaluation but was very angry, frustrated and hostile; he did not want to talk about his family, and Myers honored that request (V16/2806-07). Smith told Myers that Smith gets exercise every day and reads the paper from cover to cover every day (V16/2807). Smith also related he spends an average of six or seven hours a day reviewing legal materials for his case, some of which is ordered off the internet, and if he sees an unfamiliar word, usually with the legal stuff, he looks it up in a dictionary he has (V16/2807-08). Smith described his life prior to his September, 2009 arrest as good; he was living with his girlfriend, liked to ride his motorcycle, worked as a personal trainer and sometimes as a DJ, had friends, and socialized (V16/2808). The only stressor Smith could identify was that money was month-to-month and sometimes tight (V16/2808). Myers noted that Smith's language, speech, and ability to receive and comprehend were all normal, and that Smith demonstrated good logic and coherence (V16/2808-09).

Myers spoke with Smith about the motorcycle accident and

also reviewed the medical records from the incident and determined that Smith did not appear to have any repercussions from the accident at all (V16/2809). Smith recalled it happening, did not lose consciousness, was fully oriented in the emergency room, and his mental status and brain scan were normal (V16/2809). Myers observed that about 90% of all such minor brain injuries are completely resolved in days or weeks (V16/2809-10).

Myers had reviewed information about Smith's attack on Nicole Mitchell, and opined that Smith was able to exercise restraint, and decided to leave Mitchell bound with no further harm, evidencing self-control (V16/2810-11). Smith was able to think on his feet, be flexible, and solve problems; for example, at one point Mitchell screamed, and Smith told her to stop screaming or he would kill her (V16/2811). He didn't smack her, he just told her to be quiet or else and she did, which reflected good impulse control in the heat of the moment (V16/2811).

Myers testified that when Smith killed Mrs. Briles, he was exercising his free will (V16/2811). In terms of his brain functioning, he had a bound, helpless female lying on the floor, he made a decision to kill her, he decided to bludgeon her, went and got a large heavy object and repeatedly bludgeoned her to

death with it (V16/2812). Myers did not agree with Eisenstein's diagnosis of profound unequivocal brain damage, as he found no indication of brain damage at all (V16/2812). Myer's primary reason for disagreeing with the diagnosis was that Smith was functioning adequately without any problems in life; he was able to work, socialize, read, communicate, conduct business, ride and repair motorcycles, etc. (V16/2812). He concluded that Smith's brain functioned in the average range, although he had extra talents in the areas of mechanical thinking and electronics, having far more skill than the average person in those areas (V16/2812-13).

At the conclusion of the penalty phase, the jury recommended that Smith receive the death penalty by a vote of twelve to zero (V16/2844-45).

A Spencer[1] hearing was conducted on April 19, 2013 (V18/2979-V19/3123). The defense presented Dr. Ruben Gur and recalled Dr. Eisenstein (V18/2983, 3060). The State presented Dr. Helen Mayberg, then Dr. Gur testified again briefly in rebuttal (V18/3072, V19/3120).

Dr. Gur is a psychologist specializing in neuroimaging (V18/2983-84). Gur works with a team at the University of

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Pennsylvania exploring the connection between brain activity and behavior; they review neuroimages taken under particular parameters and compare the activity level with a control group, applying an algorithm to determine whether the imaged brain has experienced any injury or damage (V18/2985-3000). The damage they seek is not directly visible, as a lesion might be, as traumatic head injuries and other severe conditions can cause areas of diffuse damage rather than having the injury concentrated in one place (V18/2989). Because the brain communicates through electric signaling, interpreting the electrical activity in a brain may indicate whether the brain is functioning normally (V18/2989-99). The MRI reveals how much of the brain consists of white matter (the fat/myelin), gray matter (cells), and fluid; Gur calculates the volume for each region and then compares it to a "normal" brain from his control group that has already been studied and calculated (V18/3007-08).

Dr. Gur reviewed the MRI and PET scan images taken of Smith under the parameters prescribed by his wife, a medical doctor (V18/2988, 3025). According to Gur, Smith's brain is slightly above average in size, but there is reduced volume in several areas (V18/3011-12). Gur equated tissue loss with brain damage and testified that Smith's brain deviated significantly from the norm, suggesting damage (V18/3012-13). As he analyzed the

damage, most was on the right side and could have been caused by a head injury on the right and to the back of Smith's brain, where the brain bounced around in the skull and rubbed against the orbital bones, causing frontal lobe damage (V18/3013). Gur had no way to say when this happened, as he did not have enough history on Smith, but a brain injury would be the typical cause of such damage (V18/3013-14). This wasn't something that happened quickly so Gur opined that it had been there a long time (V18/3014). Gut testified that Smith's entire frontal lobe was affected, but the significant damage was most severe in the orbital frontal area (V18/3015).

Smith's PET scan was color-coded by Gur so that the areas of high and low metabolism could be discerned; Gur used a graph to help demonstrate the comparison between Smith's brain and a normal brain (V18/3018-19). Most of the areas of Smith's brain are within the average range, but there are subcortical regions that are hypometabolic, with extremely low metabolism, and cortex regions that show hypermetabolism (V18/3019). The hypermetabolism can cause more brain damage because toxic chemicals are released (V18/3020). From this Gur infers that while Smith is engaged in a task, if he feels threatened or at risk, his limbic activity goes up, his frontal lobe functioning goes down, and his thinking brain becomes deactivated

(V18/3020). Smith's PET scan also revealed abnormal brain activity, with many regions showing increased activity and a number of other regions showing decreased activity (V18/3020-21). Gur concluded that Smith's brain has reduced volume and both increased and decreased metabolism, meaning his thinking brain is hyperactive when at the resting state, and shuts down when you actually need to perform a task (V18/3021). Gur could not pinpoint a cause as there are several possible causes (V18/3021-22).

Gur described the control group for the MRI images as 41 male volunteers that were scanned at the university for a study in 2005 (V18/3030). They were individuals from society, not just students, and it is possible that some of them had personality disorders or some depression (V18/3030-31). The PET control group was more recent, but only had 16 participants; Gur explained that since it involved ionizing radiation, it could only be given to healthy people as part of a study, and there had to be justification for each individual scanned (V18/3033). He knew the group had been screened medically but otherwise didn't know much about them (V18/3034). Gur acknowledged that anxiety can affect the metabolic rate for a PET scan (V18/3046).

Dr. Eisenstein testified that he still believed that Smith had unequivocal brain damage and fell within the significantly

impaired range (V18/3060-61). Eisenstein spoke with Smith the day before the Spencer hearing but had done no further testing (V18/3061-62). Smith related that he had no history of smoking, drugs, or alcohol (V18/3062). Eisenstein noted that Smith reported having headaches after the motorcycle accident, but Eisenstein believed the brain damage had affected Smith his whole life (V18/3062-64). Eisenstein observed that Smith demonstrated a "primitive amygdale melt-down response" which resulted in an inability to modulate emotional responses, to respond appropriately in high-stress situations, and to walk away from those situations (V18/3063). The consequential behavior has been exhibited from an early age, including Smith having raped a woman at a car wash and the armed bank robbery he committed (V18/3063-64).

Dr. Helen Mayberg teaches psychiatry at Emory University and is board certified as a neurologist (V18/3072-75). She has a strong background in neuroimaging and has been reviewing MRI and PET scans for over twenty years (V18/3078). She disagreed with Dr. Gur's methodology, reasoning, and conclusions (V19/3080-3111).

Mayberg testified that Gur's methodology was problematic on a number of levels. He did not have an appropriate control group, especially for the PET scan study, as there can be

nuances with different imaging equipment which create discrepancies among scans (V19/3083-86). Also, Gur's presumption of clinical significance on any region with a difference of two standard deviations from "normal" was flawed; Mayberg explained that you can't attach any significance to any differential unless you have studied the target disorder or condition to know what the difference actually means (V19/3094-95). She noted that looking at MRI scans of 92 different regions of the brain and comparing each scan to 41 healthy individuals will, by definition, reveal some scans with more than two standard deviations difference, but you have to study the differences to determine what, if any, significance they have (V19/3097-99).

Mayberg had reviewed Smith's medical records and noted that he had ongoing problems with blood pressure and anxiety (V19/3098-99). She observed that the MRI and PET scans at issue here were normal upon visual inspection (V19/3099-3100). Even reviewing the MRI with Gur's quantitative analysis did not reveal any abnormalities, even in the sequences that are very sensitive to brain damage (V19/3100-01). There were untested variables, such as Smith's blood pressure medication, which may or may not affect the glucose metabolism as measured on the PET scan (V19/3102-04). In addition, she cautioned against assuming that Smith's scans in 2013 would have been the same in 2009

(V19/3104-06). The only differences between Smith's scan and those of the control group are noted with quantitative analysis which, as run by Gur here, was like comparing apples and oranges (V19/3107).

Mayberg also testified that Gur's comments about impulsivity and a hyperactive amygdale went beyond what doctors know about how the brain works (V19/3109). There is no accepted consensus within the scientific community as to any correlation between frontal lobe damage and criminal behavior (V19/3119). If someone did indeed have profound unequivocal brain damage based on standardized tests she would not be surprised to see identifiable findings on an MRI; she would not expect that language to be used when the MRI appears perfectly normal (V19/3109-10).

Mayberg observed that when someone loses impulse control due to frontal lobe damage, it is not intermittent but pervasive (V19/3110-11). Without regard to the cause, people with brain damage have a pattern of behavior that affects all aspects of life and would not go away simply because one is in a controlled environment (V19/3111-12). She had reviewed information about Smith's criminal history and noted that his crimes required planning and decision making, they were not impulsive crimes (V19/3108-09).

In rebuttal, Dr. Gur testified that the team reviewing Smith's scans had studied issues with medication and anxiety and did not find that such factors had any appreciable effects (V19/3120-21).

On May 28, 2013, the court followed the jury's unanimous recommendation and sentenced Smith to death for Mrs. Briles' murder (V3/441-55; V16/2851-66). The court found five aggravating factors: Smith was on felony probation; Smith had prior violent felony convictions; the murder was committed in the course of a burglary; the murder was committed for pecuniary gain; and the murder was especially heinous, atrocious or cruel (V3/446-50). The court gave moderate weight to the felony probation aggravator, noting the short amount of time that elapsed between Smith's release from prison and Mrs. Briles' murder, which was less than a year (V3/447). The court gave great weight to the prior violent felony conviction aggravator, based on the 1991 federal offenses (V3/447). The court noted that while Smith had been convicted of armed home invasion and armed kidnapping for the Sarasota offenses against Nicole Mitchell, those convictions were still on direct appeal; accordingly, while he would give great weight to this circumstance "in the event the conviction is upheld on appeal," he independently assigned great weight to this circumstances

based solely on the federal convictions (V3/447).[2] The court gave moderate weight to the during a burglary aggravator, noting this was not a case where an unexpected opportunity presented itself, given that Smith lived far from the area, the house was somewhat isolated, and that some evidence suggested Smith awaited Mrs. Briles' arrival before initiating the burglary (V3/448). The court gave no weight to the pecuniary gain aggravator, finding that it merged with the burglary aggravator (V3/448). The court gave great weight to the heinous, atrocious or cruel aggravator, explaining the circumstances of the murder in detail and concluding it was "shockingly evil and outrageously wicked, conscienceless, and pitiless" (V3/449-50).

The court rejected the statutory mitigating circumstances that Smith was under the influence of an extreme mental or emotional disturbance and that Smith's capacity to appreciate the criminality of his conduct or conform his behavior to the requirements of law was substantially impaired (V3/450-52). The court acknowledged that expert witnesses presented by the defense provided support for these factors, but noted that the opinions rendered by the State's expert witnesses "conflicted

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[2] Smith's Sarasota convictions were affirmed by the Second District Court of Appeal on February 14, 2014. Smith v. State, 2014 WL 626628 (Fla. 2d DCA Feb. 14, 2014), Case No. 2D12-345.

radically" with this testimony, and found the State witnesses to be "more persuasive and convincing" (V3/450-51). The court expressly found that Smith did not establish the existence of frontal lobe damage, but determined that even if the damage existed, there is no competent evidence of an extreme disturbance or substantial impairment on the day of the crime (V3/451-52). The court observed that Smith's behavior "on the day of the murder and the days after appears cold, calculated, rational, and goal-directed" (V3/452).

The court made the following findings as to the nonstatutory mitigating factors asserted by the defense: (1) traumatic brain injury and frontal lobe damage, rejected as not established; (2) Intermittent Explosive Order, given moderate weight; (3) loving relationship with nieces, given little weight; (4) physical, emotional, and sexual abuse as a child, given little weight; (5) acute academic failure and Attention Deficit Disorder, given significant weight; (6) remorse, rejected as not established; (7) good conduct while in custody, given moderate weight; and (8) the time the jury deliberated on penalty, rejected as not established with the court noting that the three hours before returning a recommendation was indicative of thoughtful deliberation (V3/452-54). The court concluded that the four statutory aggravators (since two were merged)

"overwhelm" the five nonstatutory mitigators found to exist (V3/454).

Following sentencing, the court entertained a motion for new trial filed by the defense (V3/467-73; V16/2870-V17/2904). One basis for contesting the verdict challenged the State's use of the medical encyclopedia, with the defense arguing that the book in evidence was not the same book as that taken from the Briles' home (V3/469-70; V16/2870-71). Although the defense conceded that the evidence was not "new" because the same evidence had been there all along, counsel maintained that his continuing to study the particular exhibit led him to note a difference between the logo on the exhibit and the logo as pictured on the book at the Briles' home (V16/2871-74). In response, the State presented testimony from Robert Lorentzen, a video production expert, who explained that the difference was a matter of exposure, and that digital photography often varies in resolution quality which may result in pictures of the same object looking slightly different (V17/2884-94). Lorentzen viewed the relevant book and photos in this case and testified that the photos were consistent with what he would expect to see if a digital camera was taking the pictures (V17/2889).

The motion for new trial was denied on July 22, 2013. A timely notice of appeal was filed thereafter (V4/643-650).

SUMMARY OF THE ARGUMENT

Issue 1. Smith's conviction for the murder of Kathleen Briles is supported by competent, substantial evidence. Smith was near the Briles' home around the time of the murder, and the following day he handed Mrs. Briles' favorite necklace to his friend, James Cellecz, to pawn. Cellecz also noticed a medical book on the floorboard of Smith's car that day, which was identified as having been taken from the Briles' home. Smith also provided his girlfriend with a set of keys on a unique, limited edition Minnie Mouse keychain that Dr. Briles had given his wife a couple of months earlier. The keychain and other items were found inside a lockbox in a large duffle bag which was in Martha Tejeda's attic. Tejeda placed the bag in her attic after urgent calls from Smith following his arrest a month after the murder. The jury heard the recorded conversations of Smith asking Tejeda to retrieve the bag from his storage unit. Smith's appellate concerns about Cellecz's veracity were rejected by the jury and do not render the State's case insufficient.

Issue 2. The trial court properly denied a mistrial after State witness Detective Linda Deniro mentioned that she had worked on a City of Sarasota investigation. The court below found that the jury would not conclude that Smith was suspected in unrelated Sarasota crimes as several jurisdictions were

involved in the Briles' murder. The challenged comment was an ambiguous, isolated remark which did not destroy the fundamental fairness of the trial, and did not warrant the granting of a new trial.

Issue 3. The trial court did not abuse its discretion in allowing Joshua Hull to testify. Hull's testimony that Smith asked him to relate a threat to James Cellecz while they were in jail was relevant to prove Smith's guilt. This Court has repeatedly recognized the admissibility of similar attempts to intimidate a witness in prior cases.

Issue 4. The trial court properly denied the request for a continuance on the eve of trial. Smith was indicted on April 1, 2010 and trial started on July 30, 2012. The factors for consideration of a last-minute continuance support the trial court's ruling. The motion was considered just prior to the start of jury selection, and defense counsel acknowledged the additional time was not necessarily to prepare for trial but primarily to appease new demands that the defendant was making.

Issue 5. The trial court did not err in finding that Briles' murder was committed in a heinous, atrocious or cruel manner. The evidence demonstrated that Mrs. Briles suffered multiple injuries, in addition to those caused by the murder weapon, while she was alive. Smith's speculation that she may

have been rendered unconscious by the first "blow to her head" is irrelevant in light of the other physical injuries and the emotional terror that would have been suffered prior to any of the multiple head injuries.

Issue 6. The trial court properly rejected the statutory mental mitigating factors. The parties presented contrasting opinions by different mental health experts, and the judge made a factual finding that the State's witnesses were more credible. Because the court's conclusions to reject the defense expert testimony are supported by the record, no abuse of discretion has been demonstrated with regard to the trial court's findings on this mitigation.

Issue 7. This Court has repeatedly upheld the constitutionality of Florida's capital sentencing statute against Smith's argument that it violates Ring v. Arizona, 536 U.S. 584 (2002). Moreover, Smith had prior violent felony convictions and a unanimous jury recommendation for death, defeating any potential Ring error.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S MOTION FOR JUDGMENT OF ACQUITTAL.

Smith initially challenges the sufficiency of the evidence to support the jury's verdict that he killed Kathleen Briles. According to Smith, the circumstantial evidence presented at trial failed to exclude the possibility that James Cellecz or someone else killed Mrs. Briles, and therefore his conviction should be reversed. "This Court's review is limited to ensuring that the State presented competent, substantial evidence that is consistent with the defendant's guilt and inconsistent with any reasonable hypothesis of innocence." Gosciminski v. State, 132 So. 3d 678, 710 (Fla. 2013); Jackson v. State, 25 So. 3d 518, 531-32 (Fla. 2009). Smith's claim fails because competent, substantial evidence supports the jury's verdict of guilt, which was inconsistent with any reasonable hypothesis of innocence in this case.

Smith was incriminated by evidence placing him near the murder scene around the time of the crime. Kathleen Briles left Publix at 3:38 p.m. on August 3, and lived six or seven minutes away (V12/1960; V14/2306). It is apparent she was attacked upon returning home, as her groceries were still in the trunk of her car when her body was found (V12/1970, 2046). Smith's cell phone

received a call, which went unanswered, at 3:44 p.m. that day; the phone communicated with a cell phone tower 1.24 miles away; the call registered on the east side of the tower, which was the direction of the Briles' home (V14/2408, 2418). In addition, cell phone records demonstrated that other communications throughout that day placed Smith's phone near the tower closest to his home on Bobyk Drive before and after the 3:44 call (V14/2404-12).

Smith was further incriminated by the powerful evidence demonstrating his possession of the property stolen from the Briles' home shortly after the murder. The very next day, Smith provided a necklace which had been taken from the home to Cellecz to pawn (V12/1997; V14/2299-2300; V15/2480-82, 2496-98). While Smith claims that this testimony was not convincing because it was not corroborated by the pawn store clerk or surveillance video, having an eyewitness testify that Smith gave the necklace to Cellecz is competent, substantial evidence sufficient to establish that fact. No further corroboration is needed.

Cellecz also observed the medical book in Smith's car that day (V15/2483-84). Cellecz recalled the book because up to that time he had never known Smith to have any interest in medicine (V15/2483). Smith's hypothesis of innocence claims the book was

a different book than that taken from the Briles' home, one he had owned long before the murder (V16/2870-71). The jury had the book itself, a picture where the book can be seen on a shelf in the Briles' home, and the testimony of Calvin Briles, positively identifying the book taken from Smith's belongings as the one he had borrowed and then returned to his mother (V12/2003-05; V13/2235, 2265-66). In addition, Smith's attorneys asserted in a motion for new trial that a logo on the book was slightly different than the book in the picture, and the State presented an expert in digital imaging to explain that the difference in coloration was a result of differences in resolution typical in digital cameras (V17/2889).

The unique Minnie Mouse keychain was put to quick use by Smith. He purchased a duplicate set of car keys for his girlfriend, and gave them to her on the same keychain he had taken from the Briles (V14/ 2324-26, 2331). There is no question this keychain was unusual and was positively identified by Dr. Briles as well as the California vendor that provided it to Briles in June, 2009 (V12/1998-2000; V13/2246-56; V14/2301-02). Smith's hypothesis of innocence is the keychain was already in the lockbox which Smith later obtained from Cellecz, but that theory is inconsistent with Quinones' testimony that Smith gave her a set of keys on the same keychain prior to it being found

in the lockbox (V14/2331).

Smith's brief claims that the State failed to present evidence inconsistent with his theory of defense, that either James Cellecz or someone else killed Kathleen Briles. However, James Cellecz testified directly that he did not break into the Briles' house and kill her, and that he got the necklace from Smith (V15/2480-82, 2490). Accordingly, the State clearly presented evidence inconsistent with this theory, and Smith's motion for judgment of acquittal was properly denied.

In Gosciminski, this Court considered similar evidence and found it sufficient to establish Gosciminski as the perpetrator. In that case, a woman was killed in her father's house and a number of expensive jewelry pieces were stolen. The victim had been wearing the jewelry when she met with Gosciminski at the home the night before the murder to discuss her father's living situation. Only hours after the murder, Gosciminski was showing similar jewelry to friends and giving a two-carat diamond ring to his girlfriend. Gosciminski later took the ring back, telling her it was "hot" and they needed to get rid of it. Some of the stolen jewelry was also found in a bag on property where Gosciminski had been near the time of the murder.

The victim was killed in the morning hours and Gosciminski had left home that morning but did not go to work until that

afternoon. Based on cell phone activity and a diagram of the particular cell phone towers which communicated with Gosciminski's phone, the evidence demonstrated that Gosciminksi was in the area of the murder that morning, and that he travelled to another part of town where some evidence was discovered by the road and another part of town to make bank deposits before returning home to shower before a presentation to be made at work that afternoon.

Much like the instant case, Gosciminski's guilt was established by his possession of the victim's stolen jewelry shortly after the murder, and by cell phone records indicating that he was in the area near where the murder occurred at the relevant time. There were no fingerprints or any other scientific or forensic evidence linking Gosciminski to the crime, and there was no confession. Yet, this Court found the evidence sufficient.

Similarly, in Finney v. State, 660 So. 2d 674 (1995), the evidence showed that a few hours after the murder, Finney pawned a VCR machine that had been taken from the victim's apartment. There was also evidence of Finney's fingerprint on some items in the apartment, but Finney lived in the same apartment complex and testified that he had previously talked to the victim and touched the items. Finney made some inconsistent statements to

the police over the course of the investigation, but never confessed. This Court held this evidence to be sufficient.

Smith asserts that Jaramillo v. State, 417 So. 2d 257 (Fla. 1982), and Ballard v. State, 923 So. 2d 475 (Fla. 2006), are similar cases where the evidence was deemed insufficient. In this case, Smith was directly linked to unusual and unique items that were stolen from the Briles at the time of Kathleen's murder. Smith was also placed in the vicinity of the crime at the relevant time by cell phone records. Neither Jaramillo nor Ballard involved such inculpatory evidence.

In Jaramillo, two people were shot in their home. There were a number of identifiable latent fingerprints that did not match Jaramillo, but his fingerprints were found on a grocery bag, a knife, and packaging from the knife. These fingerprints were the *only* evidence offered to show Jaramillo's involvement in the murders. Jaramillo testified at trial that the day before the murders, he had gone to the home to visit a friend, the victims' nephew who also lived in the house. He was helping the nephew clear out boxes in the garage when the nephew asked him to get the knife out of the bag, and take off the packaging so they could use it on the boxes. This Court held that in light of Jaramillo's plausible explanation for the presence of his fingerprints, the State's evidence, relying entirely on the

prints, was legally insufficient.

Ballard also involved a fingerprint, as well as hair evidence, at the scene of a residential murder. Ballard was a friend and neighbor to the victims and had been in the victims' apartment with several other individuals the night before the murders. Once again, because there was an innocent explanation for the presence of the fingerprint and hair, that evidence was legally insufficient to support Ballard's convictions.

In Smith's case, there has been no innocent explanation offered for Smith's presence in the area of the murder at the relevant time, as shown by the cell phone records. While that evidence did not place Smith precisely at the scene, it was far from the only evidence offered. There has been no innocent explanation for Smith's possession of the property stolen from the Briles' home, Smith simply claims that state witness Cellecz was lying. There has been no innocent explanation for his desperate conversations with Tejeda, just the suggestion that this evidence was not convincing because Smith may have been concerned about property stolen in another robbery and that someone else may have placed the items from the Briles' in the storage unit. This explanation is not reasonable since Smith would presumably know who put things in his storage unit and he failed to identify any possible perpetrator other than Cellecz.

Clearly, Cellecz' credibility and the reasonableness of Smith's claim that Tejeda's testimony was not convincing were matters for the jury. The powerful evidence connecting Smith to several different unique items stolen from the Briles' distinguishes this case from Jaramillo and Ballard, and defeats Smith's hypothesis of innocence.

Smith independently addresses the State's case and concludes that the categories of evidence -- the cell phone records, the stolen property, the threat to James Cellecz, and the phone calls to Martha Tejeda – did not individually compel the conclusion that Smith and only Smith killed Briles. He notes that there was no forensic evidence demonstrating that he ever entered the Briles' home, and that, despite the bloody scene, no blood was found on his clothes or in his car. However, the lack of such evidence does not render the State's case insufficient. The evidence suggested Smith used a mask and gloves, which would limit the opportunity to discover forensic evidence at the scene (V14/2332-33; V15/2483). Because Smith was not arrested for nearly a month and his car was not searched until several months after that, it is no surprise that no blood evidence was available; there is no way to even identify the clothes Smith may have worn at the time (V14/2290-93, 2306-08). The unidentified fingerprint on the duct tape is completely

irrelevant, since the State demonstrated the possibility that the print was created during the manufacturing process (V12/2075-78; V13/2079-89). The State is not required to identify every fingerprint at a crime scene in order to prove its case, and the existence of an unidentified print does not render the State's case insufficient.

Smith's attempt to reconcile his innocence with the evidence is unavailing. As noted above, Smith asserts that "All of the Briles' property could have been inside the lock box when Cellecz sold it to Smith," (Appellant's Initial Brief, p. 53), yet Michele Quinones testified that Smith had given her the Minnie Mouse keychain after the murder but before they were discovered in the lockbox, so clearly Smith had this item in his personal possession shortly after the murder (V14/2331). Smith acknowledges that "From the trial evidence the jury could possibly conclude that Smith removed the property from Briles' residence," but continues that "it is just as likely that Cellecz or an acquaintance of his stole the property from the house" (Appellant's Initial Brief, p. 54). The hypothesis of innocence that Cellecz or his acquaintance was the actual murderer was directly contradicted by Cellecz' trial testimony. Cellecz provided sworn testimony as to having received the necklace from Smith, and denying that he went to the Briles'

home or killed Kathleen Briles (V15/2480-82, 2490). Again, the fact that Smith disputes Cellecz's credibility does not render the State's case insufficient.

Because the State directly contradicted his hypothesis of innocence, Smith's motion for judgment of acquittal was properly denied. As the State presented competent, substantial evidence to support the jury verdict convicting Smith of Kathleen Briles' murder, this Court must reject this claim and affirm the judgment of guilt entered below.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION FOR MISTRIAL WHEN DETECTIVE DENIRO NOTED A SARASOTA INVESTIGATION.

Smith next asserts that a mistrial should have been granted due to a comment offered by Sarasota Detective Linda Deniro. The denial of a requested mistrial is reviewed on appeal for an abuse of discretion. Gosciminski, 132 So. 3d at 695. Discretion is abused when a ruling is "arbitrary, fanciful, or unreasonable," that is, when no reasonable person would take the view adopted by the court. Id.; Frances v. State, 970 So. 2d 806, 813 (Fla. 2007). A mistrial should not be granted unless the error is so prejudicial as to vitiate the fundamental fairness of the entire trial; the power to grant a mistrial "should be exercised with great care and caution and should be done only in cases of absolute necessity." Id.; England v. State, 940 So. 2d 389, 401-02 (Fla. 2006).

As the testimony was given in this case, Deniro did not actually state that Smith was being investigated by the City of Sarasota. Rather, after Deniro indicated that she had obtained some of Smith's property from Michele Quinones, the prosecutor asked an open-ended question about how that exchange came about. Deniro started to respond, stating "Regarding my investigation that I was doing for the City of Sarasota" when she was cut off

by the prosecutor (V14/2339). Her answer gave no reason to believe that there was some unrelated investigation being conducted regarding another crime which Sarasota authorities suspected Smith of having committed. Defense counsel, the prosecutor, and the trial judge were all well aware of the Sarasota offense, and took efforts during the trial to ensure that the jury did not hear of the other charges (V13/2168). The mere reference to a Sarasota investigation triggered a concern among them, but the jury did not have any knowledge of the Sarasota case and would not reasonably understand Deniro's comment to be a reference to an unrelated crime committed by Smith.

In addition, as the judge noted, the jury was aware that the investigation of this murder spanned multiple jurisdictions (V14/2340). While the murder in Terra Ceia and the Publix in Palmetto were both in Manatee County, Smith actually lived in Sarasota County with Michele Quinones (V14/2327-29). Prior to Deniro's testimony, two other Sarasota County Sheriff's Office crime scene techs had testified about their role in obtaining Smith's duffle bag from Martha Tejeda's house, also in Sarasota County (V13/2224-2243). One of the Manatee County techs even testified about taking the duct tape from Mrs. Briles to the Pinellas County Sheriff's Office, as that facility had the

ability to freeze the tape so the layers could be separated in an attempt to find fingerprints or other forensic evidence (V12/2068-70). Because other jurisdictions were actively involved in the investigation of this case, the reference to an investigation Deniro was doing "for the City of Sarasota" did not suggest a separate or unrelated crime.

Smith's reliance on Jackson v. State, 627 So. 2d 70 (Fla. 5th DCA 1993), as a comparable case is misplaced. In Jackson, the detective stated affirmatively that the defendant had been taken into custody on another charge. However, Deniro's testimony in this case simply included a reference to a Sarasota investigation which she was working on at the beginning of her explanation about receiving Smith's property from Quinones. Since Deniro did not directly or indirectly link Smith to the Sarasota investigation, the comment in this case was not comparable to the remark which warranted a new trial in Jackson.

Although Smith's appellate argument treats Deniro's comment as if it were inadmissible "collateral crime evidence," her statement cannot reasonably be said to imply that Smith committed or was even a suspect in a different case; there was no "evidence" of a collateral crime presented or even suggested. Thus, the principle presuming harm when such evidence is improperly admitted does not apply. See Peek v. State, 488 So.

2d 52, 55-56 (Fla. 1986) (noting improper admission of collateral crime evidence is presumed harmful, in a case where the jury erroneously heard that Peek had admitted and been convicted of a subsequent rape). Moreover, framing the issue to be whether collateral crime evidence was properly admitted (Apellant's Initial Brief, p. 62) is misleading, as the real issue is whether Smith's motion for mistrial due to Deniro's comment was properly denied.

Smith has failed to demonstrate that the trial judge abused his discretion in denying his motion for mistrial. The challenged testimony did not compel the granting of a new trial. The comment was an ambiguous, isolated remark. As such, its impact did not destroy the fundamental fairness of Smith's trial. Partin v. State, 82 So. 3d 31, 39 (Fla. 2011) (any impropriety was harmless where comment was vague, isolated, and did not become a feature of the trial); Rodriguez v. State, 753 So. 2d 29, 43 (Fla. 2000). This Court must deny this claim and affirm Smith's conviction.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE TESTIMONY OF STATE WITNESS JOSHUA HULL.

Smith next claims that the trial judge erred in overruling the defense objection to the testimony of state witness Joshua Hull. Hull testified that Smith asked him to relate a threat to James Cellecz, as Smith was angry that Cellecz was "snitching" on Smith after Smith gave Cellecz some "jewelry and stuff" to pawn (V14/2447-51). According to Smith, Hull's testimony was "extrinsic" to the case, Smith's statements to Hull were too vague to constitute a threat, and the probative value of the testimony was outweighed by the danger of unfair prejudice.

Evidentiary rulings are subject to review for an abuse of discretion. Gregory v. State, 118 So. 3d 770, 780 (Fla. 2013). As Smith has failed to establish any abuse in the admission of Hull's testimony, this Court must deny relief on this issue.

It should be noted initially that, to the extent Smith asserts this evidence was inadmissible because the statements were too vague to constitute a threat and that there may be other explanations for the statements, Smith's argument has not been preserved for appellate review. While the defense was granted a continuing objection to Hull's testimony below and clearly preserved the issue of admitting these statements, his appellate argument cannot be broader than the initial objection

which the court permitted Smith to continue while Hull testified. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). At Smith's trial, the objection offered by the defense was that Hull's testimony amounted to improper evidence of a distinct crime of witness tampering, which was irrelevant or, if relevant, the probative value was outweighed by the prejudicial effect, requiring exclusion (V7/901-03; V14/2446-47). He did not argue the statements were too vague or ambiguous but readily acknowledged that the evidence established that Smith was attempting to intimidate Cellecz to keep him from testifying.

While Smith claims that his statement about Cellecz was vague, there is no question that it was intended to intimidate Cellecz and, as such, was admissible. This Court has long-recognized a defendant's attempt to intimidate a witness as being relevant and admissible. England v. State, 940 So. 2d 389, 401 (Fla. 2006) (court properly admitted England's statement to another that if cohort "got me in trouble I would kill him"); Heath v. State, 648 So. 2d 660, 664 (Fla. 1994) (court properly admitted testimony that Heath wanted to escape to kill the two girls that could connect him with murder); Sireci v. State, 399 So. 2d 964, 968 (Fla. 1981); Vaccaro v. State, 11 So. 2d 186, 188 (Fla. 1942). In Vaccaro, there was evidence that the defendants "threatened a material State witness with personal

harm unless he aided in abating the prosecution," this Court held it was proper to consider the defendants' "attempt to intimidate a State witness."

Moreover, the fact that Smith can offer other, innocent explanations for his statements – such as suggesting that he was angry because Cellecz was lying – goes to the weight rather than the admissibility of this evidence. In Penalver v. State, 926 So. 2d 1118, 1133 (Fla. 2006), this Court upheld the admission of evidence that Penalver resisted giving up his shoes at the time of the arrest, so that the police had to forcibly remove them after having secured a warrant for them in a case where shoeprint evidence had been found. Penalver argued on appeal that the evidence was irrelevant, as there were other explanations beyond a guilty conscience for his behavior. This Court rejected that argument, noting that such considerations went to weight rather than admissibility; "[t]he fact that there were conflicting theories on the meaning to be attached to the evidence does not demonstrate that the trial judge abused his discretion in admitting the evidence."

In the trial below, there was a clear nexus between Mrs. Briles' murder and the statements to Cellecz, as Smith specifically noted his anger at Cellecz "snitching" after Smith gave him jewelry to pawn. There has been no showing that Cellecz

was cooperating with authorities about having pawned any other jewelry for Smith or that Smith believed this to be the case. There was no legal impediment to the admission of Hull's testimony about Smith's statements to Cellecz.

Smith cites to Fulton v. State, 523 So. 2d 1197 (Fla. 2d DCA 1988), rev. denied, 531 So. 2d 1355 (Fla. 1988), where the Second District held that collateral crime evidence of the defendant stalking the victim of a prior aggravated assault "was used to establish that the appellant had attempted to prevent the victim from testifying," a fact which the court deemed "not relevant to proving any element of aggravated assault." In that case, there was no direct evidence of a threat or statement to the victim, only the action of following the victim's car and driving by the victim's house and place of employment. Other district courts have routinely upheld the admission of testimony establishing that the defendant made a direct threat against a witness. Daniels v. State, 954 So. 2d 718, 720 (Fla. 3d DCA 2007); Knotts v. State, 533 So. 2d 826, 827 (Fla. 1st DCA 1988); Jenkins v. State, 697 So. 2d 228, 229-30 (Fla. 4th DCA 1997); Goodman v. State, 418 So. 2d 308, 309 (Fla. 1st DCA 1982) (affirming admission of evidence that while confined in the county jail, a witness heard the defendant's voice through a vent in the ceiling telling him he should think hard on his

testimony at trial because it could cause trouble for his wife and relatives).

Smith also cites Manly v. State, 640 So. 2d 142 (Fla. 4th DCA 1994), which also cites Fulton. However, as Smith acknowledges, the Fourth District receded from Manly in Jenkins, which held that threats against a witness by a defendant are in fact relevant to show guilt. Jenkins, 697 So. 2d at 230, n.2.

Accordingly, Hull's testimony was relevant. In addition, it was not subject to exclusion because of any overly prejudicial effect. Smith repeatedly asserts that this testimony had little probative value because it was not really clear what Smith was saying; he did not utter a specific threat or expressly tie it to Cellecz testifying as a witness in the Briles trial. While the probative value of this evidence may have been greater if Smith had been more direct with his threat, there is no reasonable dispute that the statements were intended to intimidate Cellecz and as such were highly relevant of Smith's guilty state of mind.

The prejudice of Hull's testimony did not exceed its probative value. The same vagueness that decreases the probative value also minimizes the prejudicial impact.

Smith's argument that the danger of unfair prejudice outweighs the probative value of Hull's testimony is not

supported by citation to any legal authority or any analysis or reasoning; he simply presents the facts and concludes the testimony should not have been presented under Section 90.403, Florida Statutes. Typically, collateral crime evidence is excluded under that statute because it becomes a feature of the trial, going far beyond what might be necessary to prove the material fact at issue. The statute requires a court to weigh the need for the evidence against the tendency to suggest an improper basis for the jury to resolve the factual issue. See State v. McClain, 525 So. 2d 420 (Fla. 1988) (discussing analysis and affirming trial court's exclusion of evidence showing trace amounts of cocaine in defendant's blood analysis which had no effect on his driving in vehicular manslaughter prosecution where defendant had a blood alcohol level of .14).

In this case, the inflammatory nature of the evidence is found in the relevant act committed – the threat to Cellecz - and not in the description of that act as provided by Hull. In most cases where prejudice is deemed "unfair," it is due to the emotional reaction brought by the evidence which is not related to the material fact at issue. For example, in McDuffie v. State, 970 So. 2d 312 (Fla. 2007), testimony was admitted describing a message that the defendant left on a witness's voice mail system. McDuffie was charged with robbery and murder,

and the evidence was presented to show his "state of mind and desperation over his financial situation." The message, left days before the murder, was directed toward an attorney who had filed an eviction notice against McDuffie, and bore no relationship to the charged crimes. The content of the message was threatening and vulgar, and the Court found that the marginal relevance shown by the fact McDuffie was angry over being evicted did not require disclosure of the obscene language used in the message.

Evidence subject to exclusion under Section 90.403 can typically be sanitized so that the relevant fact to be proven can be established in a less inflammatory manner. See Brown v. State, 719 So. 2d 882 (Fla. 1998) (requiring State to accept a defendant's offer to stipulate to being a previously convicted felon when charged with being a felon in possession of a firearm, so that jury does not hear the nature or number of prior convictions); Henry v. State, 574 So. 2d 73 (Fla. 1991) (reversing for a new trial, recognizing that some references to second killing may have been necessary, but finding the extensive testimony about the later murder to be unnecessarily excessive); Long v. State, 610 So. 2d 1276, 1280-1281 (Fla. 1992) (although evidence connected with defendant's arrest in collateral crime was admissible to establish identity and

connect him to victim of charged offense, details of collateral crime were not admissible). In the instant case, Hull's testimony about Smith's statements was not an excessive or unnecessarily prejudicial presentation of the relevant fact, that Smith had threatened Cellecz because he was angry about Cellecz's snitching.

A review of comparable case law defeats Smith's argument as to an unacceptable risk of undue prejudice in this case. In Gregory, this Court considered the propriety of testimony that, eight months before Gregory killed his former girlfriend and her new boyfriend, Gregory told a co-worker that, if he ever caught his girlfriend cheating on him, he would kill them both. This Court determined the testimony was properly admitted because it was relevant and the probative value was not substantially outweighed by the danger of unfair prejudice.

Moreover, any impropriety in the admission of this testimony was harmless beyond any reasonable doubt. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). As Smith observes, his statements to Hull were not explicit and Hull's testimony, standing alone, does not impact the credibility of Cellecz. The jury was presented with strong evidence placing Smith near the crime scene at the time of the murder, and other independent evidence establishing that Smith both possessed and used some of

the unique and unusual items stolen from the Briles' home shortly after the murder.

The trial court did not abuse its discretion in granting the State's motion to permit the testimony of Joshua Hull. Accordingly, this Court must deny relief on this claim.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING SMITH'S MOTION TO CONTINUE THE TRIAL.

Smith's next issue challenges the trial court's denial of his motion to continue the trial. A ruling to deny a motion for continuance is reviewed on appeal for an abuse of discretion. Snelgrove v. State, 107 So. 3d 242, 250-51 (Fla. 2012). The record in this case reflects that the court properly denied the motion to continue, and therefore this Court must deny this claim.

Kathleen Briles was killed on August 3, 2009 (V12/1963). Smith was arrested on February 11, 2010, and was indicted for Briles' murder on March 1, 2010 (V1/19-20, 26-27). Trial counsel Daniel Hernandez was appointed on November 4, 2010 (after the public defender and regional counsel offices had both withdrawn), and penalty phase counsel Bjorn Brunvand was appointed on March 10, 2011 (V1/139-40, 145-46). Trial was initially scheduled for July 5, 2011, but a continuance was granted and a new date of February 27, 2012, was set (V20/3149). The February 27 date was re-set to July 30, 2012, on February 21 (V20/3149).

On September 16, 2010, the State notified defense counsel that Smith's fingerprint had been found on a page in a medical encyclopedia that the State believed Smith had stolen from the

Briles' residence (V21/3219). On June 18, 2012, the defense filed a motion to compel fingerprinting, asserting that exculpatory evidence would be revealed if the cover and each page of the medical encyclopedia were inspected for fingerprints and any prints of value were compared with known prints in the federal database (V1/162-63). The motion requested that the State of Florida be compelled to conduct such examination and the motion was granted on June 27, 2012 (V1/183-84).

Thereafter, the State and the defense both filed motions to continue the trial (V20/3133-37, 3143-46). The defense initially filed a motion on July 20, ten days before trial, asserting that on that day, the State had provided notice of cell phone records it intended to use at trial, and had indicated that additional phone records would be disclosed in the coming days (V20/3133). The motion alleged that more time to prepare was required in light of the recent disclosure (V20/3133-34). The motion asserted that Smith would be denied his constitutional rights in the absence of a continuance and that the State had no opposition (V20/3134). The motion made no mention of any time needed for further investigation of potential prints on the medical book (V20/3133-36).

The State's motion, filed July 23, noted an inability to investigate Smith's penalty phase neuropsychologist, as the

witness had not been disclosed in writing at least twenty days prior to trial as required by Florida Rule of Criminal Procedure 3.202 (V20/3143-45). At a hearing on July 26, 2012, the court heard both motions. Defense counsel confirmed that the defense intended to use Dr. Eisenstein as a witness and explained the proper notice had not been filed because, while being very cooperative about guilt phase issues, Smith had steadfastly refused to help with the development of mitigation (V7/882-83). Ultimately Smith had relented and cooperated with an evaluation, but since Eisenstein did not get involved until "very recently," his name had not previously been revealed (V7/883-84). One of the prosecutors noted that discovery was ongoing and several witnesses still needed to be deposed and some of this could be accomplished over the next few weeks (V7/884).

As to the defense request for continuance, counsel reiterated the recent discovery disclosure of cell telephone records, and requested additional time to follow up on the information that had been provided (V7/885-86). A prosecutor responded that the cell phone records for Smith's cell phone on August 3, 2009 had been provided back in April, 2011, and that Detective Diamond had been deposed and fully explained these records (V7/886). However, in the last few weeks, the State anticipated a need to rebut a claim that someone else had used

Smith's phone, and accordingly subpoenaed subscriber information for the cell phones which had connected with Smith's phone around the time of the murder (V7/886-87). Several of the subscribers had been listed as witnesses long ago, but they had not been deposed (V7/887). Defense counsel acknowledged at the hearing that, as a matter of strategy, he had decided against deposing a number of the witnesses in the case (V7/909-12).

The court questioned the prosecutor about the particular information included in the supplemental discovery with subscriber cell information, the nature of the evidence available, and what had been disclosed to the defense (V7/888-90). There were about 29 phone numbers that had contact with Smith's cell on the day of the murder, although the prosecutor did not anticipate anyone saying they remembered having talked to Smith that day (V7/889-90). Primarily, the State intended to have the subscribers confirm their cell numbers and whether they knew Smith and had his cell number, and whether they recalled ever calling or being called by Smith's phone and talking to someone other than Smith (V7/889-90).

When the judge asked defense counsel if he had "anything else on this issue," counsel indicated that the only thing he could add was that he had received a report about a week earlier from the State's fingerprint expert, saying that each and every

page of the medical journal had been reviewed and fingerprinted (V7/890). Counsel stated that when he related that information to Smith earlier in the week, Smith asked him to file a motion asking that they get a defense expert to perform that same evaluation "supposedly" done by the State (V7/890). That's something that had just been discussed a couple of days ago, "[s]o that would be the only additional basis for the motion for continuance" (V7/891). The judge noted he would issue an order that afternoon on the motions to continue, and the hearing turned to other issues (V7/891).

The court thereafter denied both motions to continue (V20/3147-50). The court found that the "recently" provided phone records included information which had been available to the defense since April 2011, and the new addition of the names of the subscribers was mere surplus (V20/3149). The court also noted that the vague suggestion of a potential defense motion for their own fingerprint expert had not been reduced to writing as a basis for the continuance, and the court had not been asked to rule on that (V20/3149).

The court's ruling prompted counsel to file an amended motion to continue trial (V20/3151-55). In that motion, counsel alleged that approximately a week earlier, the State had advised counsel that the fingerprint examination of the medical book as

requested by the defense had been completed, and that no fingerprints from federal prisoners had been found (V20/3152). The motion asserted that about July 23, counsel had met with Smith and relayed this information to him and that, in response, Smith stated he did not have confidence in the State's findings and asked that an independent fingerprint expert be appointed to conduct the same testing for the defense (V20/3152-53). The motion noted that there was not adequate time to secure an expert and have the testing performed unless a continuance was granted (V20/3153). The motion did not mention federal prisoner Alex Ramos or request any additional time in order to secure Rios as a defense witness for trial.

The record does not reflect that any motion for appointment of an independent fingerprint expert to assist the defense was ever filed below.

The amended motion to continue was heard just prior to jury selection (V7/917-25). At that time, defense counsel submitted that more time was necessary in order to obtain a defense fingerprint expert and that this request had not been included in the prior motion to continue because the conversation with Smith and Smith's request for an independent expert did not occur until after the prior motion had been filed (V7/918). The defense maintained that the medical book was a crucial piece of

evidence and the defense position was that the book found in Smith's possession was not the one stolen from the Briles' home but was one that Smith had possessed for many years; Smith claimed that other inmates that had served time with Smith in a federal prison had handled the book, and if any of their fingerprints could be found, it would establish that the book was not the Briles' book (V7/918). Defense counsel made the point that they were not only trying to prepare for trial, but "also trying to meet the request of the client" (V7/918-19).

The prosecutor advised that, on or about July 20, defense counsel Brunvand called hoping that the State's fingerprint expert could compare the prints to those of a known federal inmate, Alex Ramos (V7/919). Brunvand provided the prison name and inmate number but did not have a date of birth for the inmate; the prosecutor's secretary was able to obtain that information and the State requested its expert, Robert Feverson, to compare the prints (V7/919). Feverson responded to the prosecutor on July 20 and the response was immediately served on the defense (V7/919). Feverson noted that he had only been provided with a facsimile of Ramos' prints, which was not great quality, and no palm prints were included, but checking the usable prints from the journal against the faxed set of Ramos' prints did not reveal a match (V7/919-20). Feverson indicated he

was awaiting the arrival of a mailed set of prints and would compare those once received (V7/920). The prosecutor agreed that finding prints from a federal inmate on the book would be exculpatory, but the State did not have the ability to do anything further at this point (V7/920).

The court asked if Feverson had received the mailed prints yet, and the last time the prosecutor spoke with Feverson, he had not (V7/921). At any rate the federal authorities only had Ramos' fingerprints, so if palm prints were necessary, there would presumably have to be some sort of federal action to have palm prints taken and transmitted (V7/921). The judge asked the prosecutor to contact Feverson again and confirm whether or not the mailed prints had ever been received (V7/921). At that point, the judge denied the motion for continuance (V7/922).

The parties discussed other matters and when the court asked if there was anything else to discuss, defense counsel Hernandez stated that he had just been informed, in light of the judge's ruling to deny the continuance, that Smith wanted them to try to make arrangements to have Alex Ramos testify as a defense witness, perhaps by videoconferencing (V7/924). Defense counsel did not know how difficult that might be, and just wanted to alert the court and the State that, although he had not put anything into writing at this point, "we may want to

consider trying to get Alex Ramos to testify in this case" (V7/924). The court indicated the parties probably had more experience than the court did in securing a federal prisoner for transport to another state to testify in a state court trial, and defense counsel indicated he did have some experience "and it's practically impossible, given the time that's involved" (V7/925). Counsel just wanted the court to be aware that this was another issue that had just come up, and suggested videoconferencing might be an option (V7/925). The court directed counsel to contact the prison authorities and see if they were willing to help, and that after that point they could discuss logistics (V7/925). The court denied a continuance on this basis as well, and the matter was not discussed again.

Thus, the record reflects that no reasonable basis for a continuance was offered, and the court below did not abuse its discretion in denying the request for a continuance.

Smith asserts that the trial court's assessment was flawed because the court noted that the defense could have asked for a fingerprint expert "over these past couple of years," but according to Smith, defense counsel only learned of the fingerprint expert's results a few days before the July 26 hearing (Appellant's Initial Brief, p. 70). However, this argument is misleading because the results that were obtained

shortly before trial are the results of the testing that defense counsel had requested in June, 2012. The defense had known since September, 2010 that Smith's fingerprint was on the medical book, and that other unknown prints were also found on the book. After waiting over a year and a half to request that the State examine each and every page in the book for prints and then to compare those prints to a federal database, the defense received the results of that examination and waited another week -- despite the fact that trial was only about ten days away -- before advising the court that the defendant personally was not satisfied with the inspection and wanted to secure an independent defense expert. Since no motion to secure an expert was ever filed, it appears that the need for an independent investigation was simply something offered at the last moment to secure an unwarranted continuance.

Moreover, the record reflects that there was not any possible prejudice from the ruling to deny a continuance. The record reflects that the defense continued to investigate the link between the medical book and the crime, as the claim that the book had belonged to Smith before Mrs. Briles was killed was again urged at a motion for new trial, which was heard about a month following Smith's sentencing (V3/467-73; V16/2867-V17/2894). Although the claim was not based on any "new"

evidence, the defense offered a new argument about an apparent discrepancy which the State rebutted with expert testimony about differences in exposure with digital photography (V17/2879-89). The fact that the defense continued to litigate this issue well into and even after the trial, yet never actually filed a motion seeking an independent fingerprint examination, demonstrates that an independent inspection was not considered significant to the defense.

Smith does not identify any prejudice flowing from the ruling to deny a continuance. Although he suggests that additional time was necessary to secure an independent fingerprint examiner or the testimony of Alex Ramos, there is no showing in the record that either of these sources of evidence would have been beneficial to the defense. The defense was never denied the opportunity to obtain this evidence, it was only denied a delay in the trial to explore any potential benefit. There is nothing in the record to indicate that either a new examiner or Ramos would even be used by the defense, had more time been allotted to secure them; there is no proffer to consider whether or not any possible prejudice could occur.

In Snelgrove, this Court reiterated the general rule that an abuse of discretion in denying a motion to continue is generally not found unless the ruling results in undue prejudice

to the defendant. Snelgrove, at 250. Even in death penalty cases, this Court reviews "the exercise of experienced discretion" in such matters with caution. Id., at 250-251.

According to Smith, the ruling below was an abuse of discretion because the trial court failed to consider and assess the seven factors outlined in McKay v. State, 504 So. 2d 1280 (Fla. 1st DCA 1986) and D.N. v. State, 855 So. 2d 258, 260 (Fla. 4th DCA 2003). In McKay, the First District upheld the denial of a request for a continuance on the eve of trial. In that case, the defendant was arrested shortly after a July, 1985 robbery, and the public defender was appointed to represent him. About four months later, on the Friday before his trial was set to start on Monday, McKay retained private counsel, who requested a brief continuance the morning of trial. The continuance was denied, and the attorney was invited to act as co-counsel with the public defender, but declined. McKay was thereafter convicted after being represented by the public defender.

On appeal, McKay argued that the denial of a continuance violated his right to be represented by chosen counsel with a reasonable preparation time. The First District held that right is not absolute but subject to countervailing interests, including the effective administration of justice. The proper exercise of discretion requires a court to balance several

factors; when the issue is lack of preparation time due to counsel being recently retained, the factors are: (1) the time available for preparation, (2) the likelihood of prejudice from the denial, (3) the defendant's role in shortening preparation time, (4) the complexity of the case, (5) the availability of discovery, (6) the adequacy of counsel actually provided and (7) the skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime.

Because Smith was not seeking additional time below to accommodate newly retained counsel or to provide more time for a new substitute attorney, the factors outlined in McKay are not applicable. Smith's reliance on D.N. is similarly misplaced, as that decision also considered whether a continuance was necessary to accommodate a change in counsel. In D.N. v. State, the defendant was represented by the public defender's office and a continuance was sought when a new attorney was sent to replace D.N.'s counsel on the day before the final hearing on D.N.'s violation of probation charge. The Fourth District adopted the factors noted in McKay and concluded that the trial court abused its discretion in denying the continuance.

Smith's reliance on Brown v. State, 66 So. 3d 1046, 1049 (Fla. 4th DCA 2011), is similarly unpersuasive. In Brown, the defendant privately retained counsel to represent him on drug

charges. The morning of trial, retained counsel expressed a concern about unrelated charges which were pending against counsel personally, and the judge agreed to ask potential jurors about any knowledge of those charges separately. The defendant filed a *pro se* motion to dismiss the attorney, citing a lack of preparation, a conflict based on a request for additional funds, and concerns about counsel's own legal problems. The defendant requested a continuance so that a different attorney from the same firm could take over the representation. The court denied the continuance, noting that everyone was ready for trial so the defendant could proceed with his retained counsel or represent himself, but that the trial would take place as scheduled.

On appeal, the Fourth District found an abuse of discretion in the denial of the request for a continuance. The court noted that the lower court did not consider the facts but denied the continuance only because prior continuances had been granted and this one was requested as trial was set to begin. The appellate court could not even determine how much time counsel had for preparation or what role the defendant played in shortening the preparation time. The court applied the factors noted by the First District in McKay and adopted by the Fourth District in D.N. as best it could, and concluded that discretion had been abused.

Smith's case bears little resemblance to McKay, D.N., or Brown. This is not a case where counsel had been retained or appointed but was being replaced by substitute counsel, as was the issue in each of those decisions. Because the delay sought in this case was to permit additional time to investigate by an attorney who had been working on the case for well over a year, these authorities provide little insight into the proper exercise of discretion as this issue arose below.

This Court has identified a different analysis when a continuance is sought based on the absence of a witness. A continuance should only be granted when the defendant can show: (1) prior due diligence to obtain the witness's presence; (2) substantially favorable testimony would have been forthcoming; (3) the witness was available and willing to testify; and (4) denial of the witness caused material prejudice. Mosley v. State, 46 So. 3d 510, 525 (Fla. 2009); Geralds v. State, 674 So. 2d 96, 99 (Fla. 1996). Since Smith is claiming that the continuance below was necessary in order to secure an independent fingerprint examination of the medical book and/or to secure the testimony of federal prisoner Alex Ramos, this framework is more relevant to the scenario in the present case than McKay, D.N., or Brown. None of the factors in this analysis support the granting of additional time on the eve of trial

below. Defense counsel was aware of the existence of the book and the presence of Smith's fingerprints since early in the investigation, and could have pursued an independent expert or having Ramos testify at any time. There was absolutely no showing that an expert or Ramos would have offered any favorable testimony at all, let alone "substantially" favorable testimony. There has absolutely been no showing that either an expert or Ramos were willing, ready, or able to testify; to the contrary, the expert had not even been retained, requested, or authorized, and Ramos was in a federal prison in a foreign jurisdiction. The only prejudice that has been offered is pure speculation.

Smith also cites Smith v. State, 525 So. 2d 477, 479 (Fla. 1st DCA 1988). In that case, the First District held that counsel's lack of notice concerning the State's intent to use evidence provided good cause for a continuance that should have been granted. The defendant pled nolo contendere to lewd acts and conduct in the presence of his girlfriend's eight-year-old daughter. Ten days before sentencing, the State filed a supplemental discovery notice indicating that the victim's psychologist might be called at the sentencing hearing to discuss the victim's psychological damage and the nature of the acts committed. Defense counsel had left the public defender's office where the notice was sent and did not receive the notice

until the day before the hearing. In addition, the psychologist was in Gainesville and the trial was in Lake City. The psychologist's report, which was provided the day before sentencing, was detailed, damaging to the defense, and included new information that was not reflected in other statements.

At sentencing, defense counsel requested additional time because the psychologist's report contained factual allegations by the victim that were inconsistent with and contrary to statements in the initial complaint and in depositions. The court denied the continuance but granted counsel thirty minutes to discuss the report with his client. In imposing a sentence outside the guidelines, the judge tracked some of the language from the expert's testimony and report. The First District concluded that the ruling to deny the continuance was an abuse of discretion, because counsel was not afforded an adequate opportunity to investigate and prepare any applicable defense.

In the instant case, the defense was not seeking additional time to investigate a new state witness or newly disclosed evidence that would be offered against Smith; the time was requested only to pursue potential defense witnesses that should have reasonably been anticipated long before the eve of trial. As Smith's motion was properly denied, this Court should deny relief on this claim.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN APPLYING THE AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED IN A HEINOUS, ATROCIOUS OR CRUEL MANNER.

Smith's first penalty phase claim disputes the application of the heinous, atrocious or cruel [HAC] aggravating factor. This claim requires this Court to review the record to determine whether the trial court applied the right rule of law for the aggravating circumstance and, if so, whether competent substantial evidence supports its finding. McWatters v. State, 36 So. 3d 613, 641 (Fla. 2010); Lynch v. State, 841 So. 2d 362, 368 (Fla. 2003); Willacy v. State, 696 So. 2d 693, 695-96 (Fla. 1997). Such a review in this case confirms the propriety of the court's finding and weighing of the HAC aggravating factor.

The court offered the following findings to support the application of this factor:

> This aggravating factor was proved beyond a reasonable doubt.
>
> Assessment of the applicability of this circumstance requires an objective and subjective approach. "Atrocious", "wicked", "vile", "cruel", "pain", "indifference", "suffering", "conscienceless", "pitiless", and "tortuous" are value-loaded words which require some reference to standard modes of behavior before they can be given meaning. Some assumptions about the normality of human behavior, at least how it is exhibited by the vast majority of mankind, must be acknowledged before characterizing a particular individual's behavior as falling so far outside this range so as to be labeled heinous, atrocious or cruel. At the same time, the Supreme

Court has held that this circumstance focuses on the means and manner by which death is inflicted and the immediate circumstances surrounding the death. Of special concern are those situations where the victim experiences the tortuous anxiety and fear of impending death; thus, the trial court considers the victim's perceptions of the circumstances as opposed to those of the perpetrators.

The Court will begin its analysis by focusing on the experiences of Ms. Briles. Arriving home from a routine visit to the grocery store the five-foot-three-inch, 142-pound housewife was accosted and incapacitated in her own home by the five-foot-eleven-inch, 260-pound intruder, Delmer Smith. Upon examination, the medical examiner found three areas of binding: around her neck and throat with duct tape, hands duct taped together and bound behind her back, and her legs around the ankles also bound. The medical examiner opined this took place while she was alive. Contusions found on the victim's body were attributed to blunt trauma, most likely received by blows or kicks. The most significant nonlethal blow received by Ms. Briles was a fracture to her jaw bilaterally. The medical examiner concluded this was most likely caused by her head hitting the floor or some other blunt object striking the jaw directly. Displacement of furniture about the house evidenced at least some futile resistance put up by Ms. Briles.

Before addressing the manner by which death was inflicted, the Court notes that a significant abdominal injury was suffered by Ms. Briles. Ms. Briles' liver suffered a 5-6 centimeter laceration spanning the two lobes of the liver. The liver injury was inflicted while Ms. Briles was still alive as established by the presence of 500 milliliters of unclotted blood in the abdomen. Since no external injury corresponded to the internal injury, the medical examiner concluded that the blunt trauma (a kick or knee to the abdomen) caused this injury, which would have been fatal without medical attention.

As for the mechanism by which death actually resulted, the examiner concluded that multiple blows to Ms. Briles' head with a 23-pound metal antique sewing machine created numerous skull fractures which

> compressed the bone into the brain causing massive hemorrhage and, ultimately, death.
>
> From this outline of the sequalae leading to Ms. Briles' death it takes little effort to imagine the fear, terror, anxiety, and hopelessness that the victim experienced in the minutes before she died. From the evidence we also know that the antique sewing machine used as the instrument of death was obtained by the defendant from a closet in which it was stored. Transporting it from that location, the Defendant (having previously subjected Ms. Briles to excruciating pain and discomfort) brought the instrument down with great force on Ms. Briles' skull. From an objective standpoint, it is evident that this murder was shockingly evil and outrageously wicked, conscienceless, and pitiless.
>
> (V3/449-50) (footnotes omitted).

In footnotes, the court cited the following cases as supporting the finding of the HAC factor here: Baker v. State, 71 So. 3d 802 (Fla. 2011); Allred v. State, 55 So. 3d 1267 (Fla. 2010); McGirth v. State, 48 So. 3d 777 (Fla. 2010); Lynch v. State, 841 So. 2d 362 (Fla. 2003); Chavez v. State, 832 So. 2d 730 (Fla. 2002); Banks v. State, 700 So. 2d 363 (Fla. 1997); and Zommer v. State, 31 So. 3d 733, 746 (Fla. 2010) (noting the fact the final attack occurred within the supposed safety of the victim's own home added to the atrocity of the crime); but see Rimmer v. State, 825 So. 2d 304 (Fla. 2002) (concluding fact that victims had to lie on the floor with their hands bound behind their backs while he robbed the store was insufficient to show victims were aware of their impending deaths) (V3/449).

These authorities all support the finding and weighing of the HAC factor in this case.

Smith asserts that the court's factual findings are "contrary" to the record because there was no evidence to show Mrs. Briles was conscious following the first blow to her head, and he claims that the court speculated about whether the displaced furniture demonstrates that she was offering some resistance (Appellant's Initial Brief, pp. 76-77). However, the court's inference of resistance from the crime scene was reasonable. Moreover, the findings offered in support of HAC are not contrary to the record because the court did not make any finding which suggested that Mrs. Briles remained conscious throughout the entire assault. The court below focused on the emotional terror and anxiety as well as physical injuries causing pain and suffering prior to any of the multiple blows to Mrs. Briles' head from the sewing machine.

This Court has repeatedly recognized that HAC may be properly found even when the victim does not remain conscious throughout the attack and the time of consciousness cannot be determined. In Gonzalez v. State, 136 So. 3d 1125, 1161-64 (Fla. 2014), this Court upheld HAC in a case where the victims had been shot, because the evidence showed they had been terrorized before their deaths. This Court noted that the focus must be on

the victim's perceptions; that the victim's mental state is evaluated with common sense inferences from the evidence; and that the victim must have been conscious and aware of impending death, although the perception of imminent death "need only last seconds for this aggravator to apply." The actual length of consciousness is not dispositive since fear, emotional strain, and terror "may make an otherwise quick death especially heinous, atrocious or cruel." Gonzalez at 1162, quoting Lynch at 369; James v. State, 695 So. 2d 1229, 1235 (Fla. 1997) (same); see also Davis v. State, 121 So. 3d 462, 497-99 (Fla. 2013) (upholding HAC in shooting death where victim "had sufficient time to reflect on her circumstances and thereby experience intense emotional terror and strain"). Accordingly, it is not just the act causing death, but the actions of the defendant preceding the actual killing, which are also relevant. Gore v. State, 706 So. 2d 1328, 1335 (Fla. 1997).

In Gosciminski at 714-715,, this Court upheld HAC in a crime similar to the one at bar. In that case, the female victim was attacked and killed in her own home by a much bigger, stronger man. Although the victim suffered numerous injuries, including blunt force impact injuries to the head, Gosciminski argued that HAC should not have applied because the evidence did not establish the order of the wounds, or the length of time

that the victim remained conscious. This Court rejected his arguments and upheld the application of this factor. The Court found that the variety of wounds and their placement indicated the victim "was conscious and struggling during at least part of the attack," and therefore HAC was appropriate. The Court noted that when defensive wounds are sustained during an attack, "it indicates that the victim did not die instantaneously, and in such a circumstance, the trial court can properly find the HAC aggravator." Gosciminski, 132 So. 3d at 715.

In this case, there is no reasonable argument that Mrs. Briles died an "instantaneous" death. Her awareness of her situation as well as extended physical suffering are both evident from the circumstances. Mrs. Briles would have been aware that she was bound with duct tape, as there would be no need to incapacitate an unconscious person. See Russ v. State, 73 So. 3d 178, 197 (Fla. 2011) ("based on the evidence, common sense indicates that the absence of defensive wounds on [the victim's] body resulted from either her cooperation or being bound prior to being murdered -— it does not, as [the defendant] contends, preclude a finding of HAC"). Mrs. Briles also suffered several injuries in addition to the obvious head injuries, noted by the medical examiner, including a bruised elbow and a lacerated liver that would have been fatal without quick medical

treatment (V13/2102, 2108-09, 2119-23). As in Oyola v. State, 99 So. 3d 431, 443-44 (Fla. 2012), "[i]t is logical to infer that, before [she] lost consciousness, [Mrs. Briles] feared for [her] life as [she] was struck in the head multiple times."

This case is comparable to many cases where this Court upheld HAC following a beating death. King v. State, 130 So. 3d 676, 680 (Fla. 2013) (upholding HAC where victim was struck in the head at least 17 times with a hammer); Douglas v. State, 878 So. 2d 1246, 1261 (Fla. 2004) (upholding HAC where victim was struck with tire lug wrench at least 10 times in head, and 7 to 10 times on the hands and arms); Dennis v. State, 817 So. 2d 741, 766 (Fla. 2002) (upholding HAC where both victims suffered skull fractures and were conscious for at least part of the attack, as evidenced by defensive wounds to their hands and forearms); Beasley v. State, 774 So. 2d 649, 669 (Fla. 2000) (upholding HAC where victim was repeatedly hit in head with hammer); Lawrence v. State, 698 So. 2d 1219, 1221–22 (Fla. 1997) ("We have consistently upheld HAC in beating deaths"); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995) (upholding HAC where the victim was struck seven times on the head, the victim was alive during the infliction of most of the wounds, and the last blows caused death); Colina v. State, 634 So. 2d 1077, 1081 (Fla. 1994) (upholding HAC where one of the defendants hit the

victim, who fell to the ground, and when that victim attempted to get to his feet, the other defendant hit him several times in the back of the head with a tire iron); Owen v. State, 596 So. 2d 985, 990 (Fla. 1992) (upholding HAC where the sleeping victim was struck on the head and face with five hammer blows); Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988) (upholding HAC where the defendant struck the victim six times in the head with a claw hammer, pulled his feet out from under him, and kicked him in the face); Heiney v. State, 447 So. 2d 210, 216 (Fla. 1984) (upholding HAC where seven severe hammer blows were inflicted on the victim's head).

The cases Smith cites are easily distinguishable and do not demonstrate any error in the finding of HAC below. He does not cite a single case where a victim was attacked in her home by a complete stranger. In nearly all of the cases he relies on, the murder was committed unexpectedly by someone known to the victim. See Shere v. State, 579 So. 2d 86 (Fla. 1991) (victim was shot multiple times when two "friends" turned on him during a contrived rabbit hunt); Brown v. State, 644 So. 2d 52 (Fla. 1994) (defendant and victim met in a bar and victim agreed to drive defendant to another location; victim's decomposing body had been stabbed three times); Ferrell v. State, 686 So. 2d 1324 (Fla. 1996) (victim was a drug dealer, last seen speeding away

with other drug dealers in his car, later found dead behind the wheel of his car with give gunshot wounds, four to the head); Zakrzewski v. State, 717 So. 2d 488 (Fla. 1998) (victim was sitting alone in her living room when defendant, her husband, struck her twice with a crowbar); Elam v. State, 636 So. 2d 1312 (Fla. 1994) (defendant and victim had business relationship; when victim confronted defendant about missing money, defendant struck him in the head several times with a brick); Brooks v. State, 918 So. 2d 181 (Fla. 2005) (three-month-old victim was killed by a single stabbing blow from mother's boyfriend); Williams v. State, 37 So. 3d 187 (Fla. 2010) (drug-using defendant killed his roommate, hitting her with a baseball bat after an argument erupted); Simmons v. State, 419 So. 2d 316 (Fla. 1982) (victim was struck twice in head with hatchet by his wife's new boyfriend). Mrs. Briles was not killed by a friend that suddenly turned on her unexpectedly, she was terrorized by a large, unknown masked man as he beat her, bound her, and then ravaged her house.

Although this Court rejected HAC in Rimmer, the court below acknowledged that decision in finding HAC to apply here (V3/449, n.63). While the victims were duct taped in that case, the robbery was at a car stereo business and although two employees were shot execution-style and killed, three customers that had

been detained with the employees were left untouched. Thus, Rimmer is similar to other cases relied on by the defense, but the murders in all of these cases were much quicker than Mrs. Briles' and, for the most part, there was no indication that the victims even knew they were in trouble until the fatal blow. Accordingly, they did not involve the emotional terror or the physical violence prior to the head injuries sustained below.

This Court has recognized that a victim's awareness of impending death is a component of HAC. Zakrzewski, 717 So. 2d at 493. In this case, the victim was accosted as she arrived home by a much larger man. Although she was duct taped around the neck, hands, and lower legs, there was no duct tape on her eyes and she was not blindfolded (V13/2098). She was alive when bound and alive when she received a fresh bruise on her right elbow and a forceful kick or knee to her abdomen which lacerated her liver and would have been fatal without quick medical attention (V13/2107-09, 2120-23). There were friction abrasions on her back from something hard rubbing up against the skin (V13/2113-14). The multiple skull fractures demonstrate that she was hit by the sewing machine on different sides of her head, with at least four or five blows to each side (V13/2117-19).

Smith does not mention the bruising to the elbow and suggests that the liver injury may not have occurred until after

Mrs. Briles was rendered unconscious. That suggestion is not reasonable, as there would be no reason for Smith to kick Mrs. Briles as she lay on the floor unconscious. Moreover, as Smith indicates, Mrs. Briles was probably laying face down, but the blow was to her abdomen (V13/2122, 2129; Appellant's Initial Brief, p. 15, 77). Accordingly, HAC was well established in this case.

Finally, any possible impropriety in the finding of this aggravating factor does not require a new sentencing, as it is clearly harmless beyond any reasonable doubt. While HAC is a weighty factor, the trial court found **four** other factors which, when balanced against the minimal mitigation, compel the imposition of the death sentence. In Brown, 644 So. 2d at 54, and Ferrell, 686 So. 2d at 1330, this Court found the application of HAC to be harmless where there were two other strong aggravators: prior violent felony conviction and during the course of a robbery. Smith's case also remains heavily aggravated, and no compelling mitigation was found below. On these facts, this Court must reject this claim and affirm the death sentence imposed on Delmer Smith.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN REJECTING THE STATUTORY MENTAL MITIGATING CIRCUMSTANCES.

Smith also challenges the trial court's findings with regard to mitigation. Specifically, Smith claims that the court below could not reject the testimony of the defense expert testimony as a matter of law, because the defense expert was a psychologist and the State's expert was a psychiatrist, not trained to interpret neuropsychological testing, and the State's expert did not specifically address the two statutory mental mitigating factors (Appellant's Initial Brief, pp. 82, 87). Smith also contends that the trial court's reasoning was speculative and that the trial judge improperly injected his own personal view in making relevant findings (Appellant's Initial Brief, pp. 82, 85).

Trial court findings on mitigation are reviewed for an abuse of discretion. Hoskins v. State, 965 So. 2d 1, 16 (Fla. 2007); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert. denied, 520 U.S. 1122 (1997). A review of the evidence presented below and the sentencing order establishes only that Smith disagrees with the factual conclusions reached by his trial judge, and no abuse of discretion occurred below. Therefore, this claim is without merit and Smith's sentence must be

affirmed.

In sentencing Smith to die for the murder of Kathleen Briles, the trial judge complied with all applicable law, including the dictates of this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990). He expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of his findings by discussing the factual basis for the findings. Campbell clearly recognizes that the factual question as to whether a mitigating factor was reasonably established by the evidence is a question for the trial judge. Campbell, 571 So. 2d at 420.

The record reflects that the defense presented Dr. Hyman Eisenstein as an expert witness at the penalty phase (V16/2735-86). Eisenstein is a psychologist with a specialty in neuropsychology (V16/2736). He saw Smith twice in July, 2012, conducting a full neuropsychology battery of tests; he also reviewed background material and reports (V16/2737-38). He noted that Smith's school records indicated severe academic failure and concluded that Smith suffered from Attention Deficit Disorder, Intermittent Explosive Disorder, and "unequivocal brain damage" (V16/2747, 2749, 2753-54, 2785). He concluded that Smith was under the influence of an extreme mental or emotional disturbance at the time of Mrs. Briles' death, and that Smith's

capacity to appreciate the criminality of his actions or to conform his conduct to the requirements of law was substantially impaired (V16/2785).

According to Eisenstein, there was some unsophisticated plan to rob Mrs. Briles, but the accompanying violence was unplanned, unexpected and impulsive (V16/2755-56). Eisenstein then backtracked to say the use of gloves to commit the robbery was simply a matter of being proactive about not being caught and "not really planning" (V16/2756). The violence only occurred because Smith was confronted with his situation, was unable to leave or to mentally come up with a reasonable alternative due to his frontal lobe damage, and Smith just reacted to a bad situation (V16/2756). Eisenstein noted that brain impairment comes in varying degrees and opined that Smith's damage was "profound," which he described as "beyond severe, it's the same things as severe" (V16/2766-67). He testified that he has found mental illness or brain injury in 90 to 95% of the death row inmates he's seen (V16/2765).

Dr. Eisenstein's testimony was directly refuted by the State's expert witness, Dr. Wade Myers (V16/2791-2814). Dr. Myers is a medical doctor with a specialty in psychiatry; he is currently a professor in psychiatry at Brown University, having previously worked as chief of forensic psychiatry at the

University of South Florida (V16/2791-92). Dr. Myers evaluated Smith's brain functioning and also reviewed background material and records, as well as all of Dr. Eisenstein's work (V16/2796-97). Myers diagnosed Smith with Antisocial Personality Disorder and found that nothing in the records or the testing supported the diagnoses for Intermittent Explosive Disorder or any brain damage (V16/2803-04, 2812). The prison, mental health and medical records repeatedly documented that Smith did not have a mental disorder, illness, or disability (V16/2803-04, 2809). Myers did not expressly reject the diagnosis of Attention Deficit Disorder, but testified that ADD is not an extreme mental or emotional disorder and is typically found in children and involves symptoms such as an inability to stay in your seat or pay attention (V16/2804).

Myers opined that the lack of disciplinary reports in Smith's prior Department of Corrections files was inconsistent with Eisenstein's testimony that Smith was impulsive; particularly with Smith participating in team sports, which often generates more fighting among players than when played in the community, the absence of DRs indicates that Smith adjusted well to prison and was well in control of his desires and impulses (V16/2802-03). Moreover, Smith's lifestyle in the summer of 2009 showed that Smith was able to work as a personal

trainer and sometimes as a disc jockey, socialize, read, communicate, conduct business, and drive and fix motorcycles (V16/2808, 2812). While in prison Smith exercised every day, read the newspaper from cover to cover every day, and spent six or seven hours a day reading legal material for his case, some of which is ordered off of the internet (V16/2807). Myers noted that Smith's language, speech, and ability to receive and comprehend were all normal, that Smith demonstrated good logic and coherence, and that Smith had no problems understanding (V16/2808-09).

Although Myers testified he does not have the training to be a psychologist, he never indicated that he was not qualified to review and interpret the tests which Eisenstein conducted (V16/2795). To the contrary, and without any objection that it exceeded his expertise, Myers discussed several of the specific tests given and scores obtained by Eisenstein; Smith got a perfect score on a complex visual memory test, and did well on the TOMM, a memory test which assesses the effort someone is using as well as measuring memory system and how well one pays attention (V16/2804-05). Myers noted that the IQ score based on Eisenstein's testing had no scoring errors and reflected that Smith functioned in the average range (V16/2806). Myers opined that the increase in IQ score as compared to the test Smith took

when he was 14 years old suggested that Smith did not put forth his full effort in the earlier test, since IQs generally remain stable over a lifetime (V16/2806).

At the Spencer hearing, the defense presented Dr. Ruben Gur, a psychologist specializing in neuroimaging (V18/2983-84). According to Gur, MRI and PET scans conducted on Smith reveal abnormalities in Smith's brain functioning, indicating that Smith had an impaired, damaged brain (V18/3011-13, 3015, 3018-21). The State's expert, Dr. Helen Mayberg, a professor of psychiatry at Emory University, is board certified in neurology and has a strong background in neuroimaging (V18/3072, 3075-78). Mayberg testified to numerous flaws in Gur's methodology and conclusions (V19/3079-3112). She reviewed Smith's scans and did not detect any abnormalities, even with Gur's quantitative findings (V19/3100, 3102). She would not describe anything she saw as brain damage (V19/3102, 3107). She noted that Gur's use of an MRI to diagnose a mental disorder is not generally accepted in the scientific community, and that there was no accepted consensus among the scientific community as to any correlation between frontal lobe damage and criminal behavior (V19/3089, 3119). None of the doctors that testified at the Spencer hearing discussed or addressed the two statutory mental

mitigating factors.[3]

In the sentencing order, the trial court rejected the statutory mitigating factors, as well as the proposed nonstatutory mitigator that Smith has traumatic brain injury and frontal lobe damage (V3/450-452). After summarizing relevant expert testimony, the court noted that the opinion of the experts "conflicted radically" (V3/451). The court observed that it was the burden of the defendant to establish the existence of mitigating factors, and that Smith failed to meet this burden "[s]ince the Court finds the testimony of Dr. Myers and Dr. Mayberg more persuasive and convincing" (V3/451). The court expressly found that no frontal lobe damage existed, but that even if it did, there was no competent evidence to suggest that Smith was under the influence of an extreme mental or emotional disturbance on August 3, 2009 (V3/451-52). The order also relates that Smith's behavior on the day of the murder and in the days after "appears cold, calculated, rational, and goal-directed" (V3/452).

Smith now asserts that the court below erred in rejecting the statutory factors, "[b]ecause Dr. Eisenstein's opinion was unequivocal and not refuted by another psychologist trained to

[3] In addition to Drs. Gur and Mayberg, Dr. Eisenstein provided further testimony at the Spencer hearing (V18/3060-71).

interpret the neuropsychological testing" (Appellant's Initial Brief, p. 87). However, this Court has repeatedly recognized that even uncontroverted expert testimony may be rejected when it cannot be squared with the facts of the crime. Allen v. State, 2013 WL 3466777 (Fla. July 11, 2013); Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006); Foster, 679 So. 2d at 755.

In this case, while Smith claims that Eisenstein's opinion was "not refuted," the record reflects that it was. Smith's assertion that only "another psychologist trained to interpret the neuropsychological testing" could refute Eisenstein's opinion is without merit (Appellant's Initial Brief, p. 87). There is absolutely no authority to support the suggestion that a medical doctor specializing in neurology does not have sufficient training and experience to refute a psychologist's opinion as to the presence of mental disorders and impairment. The law only requires "competent, substantial" evidence to refute an expert opinion, it does not demand contrary evidence from a source with exactly the same credentials as the defense expert. Coday, 946 So. 2d at 1003.

On the facts of this case, the trial court's finding that the expert testimony presented "conflicted radically" (V3/451), is fully supported by the record. The resolution of that conflict, as this Court has repeatedly recognized, is a matter

for the trier of fact, and a trial court commits no error in rejecting expert testimony which is directly refuted by contrary expert testimony. See Hilton v. State, 117 So. 3d 742, 754 (Fla. 2013); Zommer v. State, 31 So. 3d 733, 749 (Fla. 2010); Hoskins v. State, 965 So. 2d 1, 17 (Fla. 2007); Philmore v. State, 820 So. 2d 919, 936 (Fla. 2002); Knight v. State, 746 So. 2d 423, 436 (Fla. 1998); Walker v. State, 707 So. 2d 300, 318 (Fla. 1997); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994).

Moreover, as noted above, even without contrary expert opinion testimony, an expert's conclusions as to mitigation can be defeated by the facts of the case. Many cases confirm this principle. See Heyne v. State, 88 So. 3d 113, 123-24 (Fla. 2012) (rejecting substantial impairment mitigator based on ADHD and possible bipolar disorder, noting Heyne's "purposeful actions," including his ability to obtain a gun, fire it accurately, contact his ex-girlfriend, conceal incriminating evidence, and lie to police about his involvement); Oyola v. State, 99 So. 3d 431, 445-46 (Fla. 2012) (Oyola's intelligence, ability to understand his criminal conduct, and actions in attempting to cover up the crime supported rejection of statutory mental mitigator); Allen, 2013 WL 3466777 at *16-17 (substantial impairment mitigator refuted where crime was not impulsive but took an extensive period of time, and Allen destroyed evidence

in an attempt to exculpate herself from the murder).

In this case, the trial court's finding that Smith's actions around the time of the murder to be rational and goal-directed is well supported by the record. Mrs. Briles was accosted upon returning home from shopping. Smith was able to subdue her, search her house for valuables, decide to kill her, and locate a heavy object to accomplish the deed. The next day he secures a friend to pawn some of the jewelry and, upon his arrest, he calls another friend to get incriminating evidence out of his storage unit to hide it from the police. As Dr. Myers testified, this was not an impulsive crime but required planning and making decisions (V16/2811-12). Myers and Mayberg also noted that Smith's prior criminal history also involved extensive planning and decision making (V16/2810-11; V19/3108-09). On these facts, no abuse of discretion has been shown with regard to the trial court's treatment of the mental mitigation evidence.

The cases cited by Smith are not factually comparable and do not compel a different result. In Campbell, the evidence of impaired capacity was "extensive and unrefuted," as his IQ was in the retarded range, he had poor reasoning skills, his reading abilities were on a third-grade level, he suffered from chronic drug and alcohol abuse, he had borderline personality disorder,

and he had attempted suicide before trial and been placed on antipsychotic medication. Campbell, 571 So. 2d at 418-19. The court rejected the substantial impairment mitigator only because there was no evidence that Campbell was insane at the time of the killing.

Nibert v. State, 574 So. 2d 1059, 1061 (Fla. 1990), was another case where the State did not present any evidence to challenge a defense expert's opinion as to the existence of statutory mitigation. Nibert had suffered chronic and extreme alcohol abuse since his preteen years and had been drinking heavily the day of the murder and was drinking at the time of the attack; there was also evidence about how his personality changed radically and he lacked substantial control over his behavior when he was drinking.

Smith's reliance on Cook v. State, 542 So. 2d 964 (Fla. 1989), and Ferrell v. State, 653 So. 2d 367 (Fla. 1995), is curious as both of those cases simply remand for new sentencing orders. This Court does not hold that any mental mitigation was improperly denied and the cases do not discuss relevant facts or standards to show any applicability to the instant case.

The Coday decision provides an extensive discussion of the standards and principles involved in consideration of the presentation of mitigation. In Coday, the defendant killed his

former girlfriend. He had been desperate to reunite with her, and she came to see him, but they got into an argument, and Coday went into a rage and punched her, hit her with a hammer, then stabbed her. The case supports the rejection of Dr. Eisenstein's testimony below because, as noted above, it confirms that a trial court may reject any proposed mitigating factor where there is competent, substantial evidence to support the rejection. Coday, 946 So. 2d at 1003.

In that case, six defense mental health experts testified that Coday was unable to conform his conduct to the requirements of the law at the time of the murder. As this Court emphasizes, the State did not offer any expert witness to refute this testimony. Id. The trial court's rejection was premised upon the testimony of lay witnesses indicating that Coday had lived a crime-free life for many years, that he was a punctual and reliable employee, and that he had obtained a degree from the University of Michigan. However, none of this testimony was inconsistent with the testimony of the defense expert witnesses. Because the testimony was not inconsistent, the trial court in Coday should have accepted the experts' opinions as to the mental mitigation. As this Court noted, such expert testimony can only be rejected "if it did not square with the other evidence in the case." Id. at 1005.

In Smith's case, Dr. Eisenstein's testimony that Smith was under the influence of an extreme mental or emotional disturbance and was substantially impaired due to his ADD, IED, and unequivocal brain damage cannot be squared with Dr. Myers' testimony that Smith's records do not support any diagnosis of IED, that Smith does not have brain damage, and that ADD is not an extreme mental or emotional disturbance. Because the court below found Myers and Mayberg to be "more persuasive and convincing," it properly rejected the mental mitigation.

Smith also cites Alamo Rent-A-Car v. Phillips, 613 So. 2d 56 (Fla. 1st DCA 1992). He claims that the court below committed the same error noted in that case, because the judge improperly drew from his personal opinion and experience to reject the expert testimony offered. That case presented a worker's compensation case based on allegedly work-related pneumonia. Phillips' job required him to wash vehicles throughout the night, and he reported getting soaking wet on cold, windy nights. The employer/carrier had an expert doctor who disputed the causal connection between the weather and Phillips' pneumonia. Phillips attempted to strike the testimony based on the expert's excessive fee and although the motion was denied, the claims judge ultimately awarded benefits on the claim. The judge made comments such as indicating that he didn't "give a

shit" what the expert said; that the judge knew better, from personal experience, that cold or wet conditions could aggravate pneumonia; and he did not need an expert or "hired gun" to know that Phillips' illness was caused and advanced by the workplace environment. The First District found that the proceeding was fundamentally unfair because the comments reflected bias and prejudice against the defense expert witness. Id. at 58.

The court below certainly did not commit this same error. The court rejected Dr. Eisenstein's testimony based entirely on the testimony of other witnesses and the evidence presented about the facts of the case. Smith has not identified any improper statements or comments suggesting any possible bias or prejudice on the part of the court below.

Finally, even if this Court reaches a different conclusion with regard to the trial court's findings as to any of this mitigation, there is no reason to remand this cause for resentencing since it is clear that any further consideration would not result in the imposition of a life sentence. Although the court found that the statutory mental mitigating factors had not been proven, it provided "moderate" weight to the nonstatutory factor that Smith suffers from Intermittent Explosive Disorder and gave "significant" weight to Smith's acute academic failure and attention deficit disorder as a child

(V3/452-53). Other nonstatutory mitigation was also found and weighed (V3/453-54). Any error relating to the sentencing court's failure to weigh the statutory factors is clearly harmless since the mitigation in this case cannot offset the **five** strong aggravating factors found. See Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla.), cert. denied, 522 U.S. 880 (1997); Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991). Therefore, this Court must affirm the death sentence imposed in this case.

ISSUE VII

WHETHER FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL UNDER RING V. ARIZONA.

Smith's last claim asserts that Florida's capital sentencing statute is unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). The constitutionality of a statute is reviewed *de novo*. Scott v. Williams, 107 So. 3d 379 (Fla. 2013); State v. Catalano, 104 So. 3d 1069 (Fla. 2012).

This Court has repeatedly rejected Smith's claim that Ring invalidated Florida's capital sentencing statute. Gonzalez v. State, 136 So. 3d 1125, 1168 (Fla. 2014); Frances v. State, 970 So. 2d 806, 822 (Fla. 2007) (noting this Court had rejected Ring claims in over fifty cases); Gudinas v. State, 879 So. 3d 616, 617 (Fla. 2004). Although Smith requests that this Court reconsider Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002), and King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002), he has provided no basis for doing so. Moreover, Smith had prior violent felony convictions, making him independently eligible for a death sentence under Florida law. Gonzalez, 136 So. 3d at 1168; Frances, 970 So. 2d at 822; Gudinas, 879 So. 2d at 617-18. His unanimous jury recommendation satisfies any right to jury sentencing that Smith reads into Ring. Relief must be denied.

STATEMENT REGARDING PROPORTIONALITY

Although Smith does not contest the proportionality of his death sentence, this Court considers the issue on direct appeal in every capital case. See Gosciminski at 716; Miller v. State, 42 So. 3d 204, 229 (Fla. 2010). Accordingly, the following analysis is offered to assist the Court with its proportionality review.

In this case, the trial court found five aggravating factors: Smith was on felony probation; Smith had prior violent felony convictions; the murder was committed in the course of a burglary; the murder was committed for pecuniary gain (given no weight as it was merged with the burglary); and the murder was especially heinous, atrocious or cruel (V3/446-50). The court weighed this aggravation against five nonstatutory mitigating factors: Intermittent Explosive Disorder; loving relationship with nieces; physical, emotional, and sexual abuse as a child; acute academic failure and Attention Deficit Disorder; and good conduct while in custody (V3/452-54). The jury recommendation for death was unanimous (V2/340).

Smith's capital sentence is clearly proportionate. This Court has frequently upheld the death penalty in brutal home invasion murders. See King v. State, 130 So. 3d 676, 686 (Fla. 2013) (during burglary/pecuniary gain and HAC weighed against

numerous nonstatutory mitigators including lack of violent history); Hodges v. State, 55 So. 3d 515, 542-43 (Fla. 2010) (under sentence of imprisonment, prior violent felony conviction, HAC, CCP, and during a felony weighed against statutory factors of age, extreme disturbance, and substantial impairment, along with numerous nonstatutory mitigating factors); Banks v. State, 46 So. 3d 989, 1000-01 (Fla. 2010) (prior violent felony convictions, HAC and CCP weighted against low IQ, brain deficits, antisocial personality traits, and difficult youth); Miller, 42 So. 3d at 229-30 (under sentence of imprisonment, prior violent felony conviction, during burglary, HAC and advanced age victim weighed against dysfunctional family background, antisocial personality disorder, and long history of substance abuse); Beasley v. State, 774 So. 2d 649 (Fla. 2000) (during burglary and HAC weighed against numerous nonstatutory mitigators).

In Gosciminski, this Court upheld a death sentence imposed for a brutal home invasion with similar facts. Although that case included the aggravating factor of cold, calculated and premeditated which was not asserted below, this case is just as aggravated because Smith was on probation for a prior violent felony, had been out of prison less than a year, and had committed another violent home invasion several months earlier.

Gosciminski did not have any significant criminal history and established thirteen nonstatutory mitigating circumstances, including having a mixture of "disordered personality characteristics;" injuries from a motorcycle accident, and a positive work history. See also Baker v. State, 71 So. 3d 802 (Fla. 2011) (home invasion committed for drug money); Duest v. State, 855 So. 2d 33 (Fla. 2003) (victim was stabbed in his home and robbed of jewelry).

The death penalty is appropriate when this case is compared with factually similar cases. Accordingly, this Court must affirm the sentence imposed on Smith.

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court AFFIRM the judgment and sentence imposed on Appellant Delmer Smith.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2014, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system which will send a notice of electronic filing to the following: Julius Aulisio, Assistant Public Defender, Office of the Public Defender, Tenth Judicial Circuit, Post Office Boc 9000-Drawer PD, Bartow, Florida 33831-9000, **jaulisio@pd10.state.fl.us** [and] **mjudino@pd10.state.fl.us.**

Respectfully submitted,

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