Filing # 12262377 Electronically Filed 04/08/2014 03:06:16 PM

RECEIVED, 4/8/2014 15:08:38, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

DELMER SMITH,	:	
Appellant,	:	
vs.	:	Case No. SC13-1550
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JULIUS J. AULISIO
Assistant Public Defender
FLORIDA BAR NUMBER 0561304

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

CONSTITUTIONS AND STATUTES

STATEMENT OF THE CASE

Delmer Smith, Appellant, was charged by indictment in Manatee County with first degree murder of Kathleen Briles allegedly committed on August 3, 2009, in violation of sections 782.04 and 777.011 Fla. Stat. (2009). (1/26) On June 25, 2012, Appellant filed a motion to bar imposition of death sentence on grounds that Florida's capital sentencing procedure is unconstitutional under Ring v. Arizona. (2/205-216,). This motion was denied on July 26, 2012. (2/230, 231)

Appellant and the State filed motions for continuance. (20/3133-3138, 3143-3146) The State indicated defense counsel had not deposed a majority of state witnesses including the crime scene technicians and medical examiner. (7/884, 887) About a week before the hearing, defense counsel (Hernandez) learned that the State's finger print expert had checked fingerprints on every page of the medical journal. Hernandez wanted time to hire a fingerprint expert to do a fingerprint evaluation of the medical encyclopedia. (7/890) The State (Iten) argued additional cell phone records were to be used to rebut a claim that someone other than Smith used the cell phone. None of the people the State would use for this purpose had been deposed. (7/886, 887) As additional grounds for a continuance Hernandez asked for time to depose the

medical examiner and some of the other witnesses. (7/911, 912) The trial court denied the motion for continuance on July 26, 2012, but ordered the state to make the medical examiner and Joshua Hull available for deposition. (7/912, 913; 20/3147-3150)

Appellant filed an amended motion for continuance so his request to hire a fingerprint expert would be reduced to writing. The State fingerprint expert found no positive comparison of any federal prisoners' fingerprints on the medical encyclopedia. Hernandez did not receive the results from the State's fingerprint expert until near the time of the motion for continuance filed on July 20, 2012. When Smith learned the fingerprint results, he requested for Hernandez to have a defense expert examine the medical encyclopedia. (7/917, 20/3151-3155) On July 30, 2012, Hernandez argued it would be ineffective assistance of counsel if they did not have their own fingerprint expert examine the medical encyclopedia. It was the defense position that the medical encyclopedia, claimed to have come from the Briles residence, actually come from federal prison and fingerprints of federal inmates on the book would substantiate the defense theory. Counsel also renewed his other arguments for a continuance. (7/918, 919)

Apparently the prosecutor was aware of the defense theory because he had his fingerprint expert compare the prints of federal inmate Alex Ramos using facsimile prints and no additional identification was made. The expert was awaiting arrival of mailed prints to confirm his findings. Iten agreed that if a federal inmate's prints appeared on the medical encyclopedia, it would be

exculpatory evidence because there were no prints of any members of the Briles family on the medical encyclopedia. There were some palm prints discovered in the medical encyclopedia and they did not have Ramos' palm prints. (7/919-921) The trial court denied the motion for continuance stating: "I think if the Defense had been concerned about the unreliability of the State's appraisal of the evidence it could have asked for a fingerprint expert over these past couple of years." (7/922) Hernandez asked to be able to make arrangements to have Alex Ramos, a federal prisoner, testify. (7/924) Hernandez asked the court to consider that as an additional ground for continuance. The motion for continuance was denied. (7/925)

On July 5, 2012, the State filed a notice of intent to use evidence of other crimes, wrongs, or acts committed by the defendant (threats to James Cellecz), pursuant to Section 90.404(2), Florida Statutes (2011). The motion alleged that Smith knowingly used intimidation or physical force, or threatened another person, with the intent to cause or induce James Cellecz to withhold testimony from an official proceeding, to wit: a trial, contrary to Section 914.22(1)(a) Florida Statutes. The State intended to introduce this evidence of other crimes, wrongs, or acts as proof of Defendant's consciousness of guilt. (2/225, 226) The State's notice of intent to use evidence of other crimes, wrongs, or acts was granted on July 26, 2012. (2/269-271)

The case proceeded to jury trial commencing on July 30, 2012. (7/915) On August 9, 2012, the jury returned a verdict of guilty

of murder in the first degree. (15/2652) The penalty phase commenced on August 14, 2009. (15/2661) After penalty phase, the jury returned a 12-0 recommendation of death. (16/2845) Defense counsel filed a motion for appointment of mental health expert for the purpose of interpretation of the quantitative analysis of defendant's MRI and PET scan. (2/358-360)

A Spencer hearing was conducted on April 19, 2013. Dr. Gur, a clinical psychologist professor in the Department of Psychiatry at the University of Pennsylvania, had MRI and PET scan testing done locally on Delmer Smith based on parameters he and his team specified. (18/2983-2988) Mr. Smith's MRI showed quite extensive frontal lobe damage which is clearly abnormal. (18/3011-3013, 3015) Other areas of his brain also show brain damage which seems to have been there for quite some time. (18/3013, 3014) From the PET scan images for Smith, Dr. Gur concluded that his thinking brain is hyperactive at the resting state, and shuts down when it actually needs to perform a task. This looks to be consistent with traumatic brain injury. (18/3018-3022) In mild to moderate traumatic brain injuries the scans are read by a radiologist as normal. (18/3054)

Dr. Eisenstein previously testified at the penalty phase of the jury trial. Eisenstein had testified that Smith had unequivocal brain damage. He clearly falls within the significantly impaired range of brain damage. (18/3060, 3061)

Eisenstein reviewed Dr. Gur's report and met with him again the day before the Spencer hearing to see if there were any

changes in the last eight or nine months. Eisenstein did not do any additional testing. Throughout his life Smith has had a very primitive amygdale melt-down response. He has had an inability to respond appropriately to high-stress situations, and the inability to walk away from those situations. From an early age, situations have occurred which presented challenging situations to Smith's brain capacity, or lack thereof, to control and inhibit those type of behaviors. This inability to control his behavior was evident in an incident at age 14 when he was accused of raping a 40 year old woman, and years later when committing a bank robbery. This behavior suggests that the brain damage was present a long time before the motorcycle accident on July 10, 2009. School records reflect that Smith had all sorts of issues with cognitive intellectual impairment. (18/3061-3065)

Smith has shown that he presents no problems in a structured setting. He has continuously taken care of himself by exercising and cleaning the pod. He has been institutionalized in a prison setting. He causes no harm. He is not a danger to anyone else in a prison setting. Smith wants to present himself as healthy and as normal as possible. He wanted to give his family sound advice. Unfortunately, he has not been able to take his own sound advice. He has never dealt effectively with what has happened to him and how he can modify his behavior, other than when controls are put on him from outside. Internally, his own resources are totally lacking. This explains why he has failed so miserably in the outside environment but he does so well in a controlled

environment. Smith's response which is totally inappropriate in highly charged stress situations is not volitional because it is an inability to control. (18/3065-3067)

State witness Helen Mayberg, professor of psychiatry, neurology, and radiology at Emory University School of Medicine, testified that a PET scan is worthless as a general screening test. It is not used in medicine, neurology, or psychiatry as a general screen to know if something is wrong with the brain. The pattern of brain metabolism in people at rest can be influenced by the level of anxiety that is present. People that have an anxiety disorder can have resting-state PET scan abnormalities. A PET scan looks at the functioning of the brain. (18/ 3072, 19/3087-3089) It is not generally accepted in the medical community to use an MRI to diagnose a mental disorder. Many things that are very wrong with a person may not have something that's seen on the scan. (19/3089)

Smith's medical records indicate he was complaining of anxiety in weeks leading up to his PET scan. Mayberg did not see a psychiatric exam, diagnosis, or treatment plan, for Smith's anxiety but only that it was noted in his records. Mayberg reviewed the MRI and PET scan images done of Smith. Mayberg's visual inspection, without having Dr. Gur's interpretation of the PET scan, revealed that it was normal looking. Even after reviewing the PET scan with Dr. Gur's findings, Mayberg was not seeing the abnormalities in the findings. However, Mayberg was not comparing the scan to her normal controls or to Gur's normal

controls. (19/3099, 3100)

Mayberg reviewed the MRI and did see the lesion identified by the radiologist. There is a small area in the white matter high in the brain toward the front. It is the kind of thing you see in people with high blood pressure. Smith has high blood pressure in his history. Otherwise the scan is normal. Mayberg would not describe anything she saw on the MRI or PET scan as brain damage. (19/3100-3102) Mayberg did not see Eisenstein's raw testing neuropsychological data. (19/3118)

A written sentencing order was filed on May 28, 2013, along with the judgment and sentence imposing death. The trial court found the following statutory aggravators: 1) The capital felony was committed by a person previously convicted of a felony and on felony probation (moderate weight). 2) The Defendant was previously convicted of a felony involving the use or threat of violence to the person (great weight). 3) The capital felony was committed while the Defendant was engaged in the commission of a burglary (moderate weight). 4) The capital felony was committed for financial gain (merged with 3 and given no weight.) 5) The capital felony was especially heinous, atrocious, or cruel (great weight).

The court found the following two statutory mitigators were not proven: 1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. 2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the

requirements of the law was substantially impaired. The court considered the following non-statutory mitigating factors: 1) Mr. Smith has traumatic brain injury and frontal lobe damage (not established). 2) Mr. Smith has intermittent explosive disorder (moderate weight). 3) Mr. Smith's loving relationship with his nieces (little weight). 4) Mr. Smith's physical, emotional, and sexual abuse as a child (little weight). 5) Mr. Smith's acute academic failure and attention deficit disorder as a child (significant weight). 6) Remorse (not established). 7) Mr. Smith's good conduct while in custody (moderate weight). 8) Time jury deliberated on penalty (not proven). (3/441-455, 457-462)

Appellant filed a motion for new trial or alternatively new penalty phase based on newly discovered evidence on June 3, 2013. (3/467) The motion for new trial was denied. (4/643-648) Appellant filed his notice of appeal on July 26, 2013. (4/649, 650)

STATEMENT OF THE FACTS

GUILT PHASE

Kathleen Briles stopped at 7-Eleven on August 3, 2009, about 2 p.m. to visit her friend Kristie Gish. Gish noticed that Briles was wearing a watch which appeared to be the same watch as State exhibit LD-1. (12/1949-1951, 1953) Video surveillance from Publix in Palmetto showed Briles exit the store at 3:36 p.m. with a cart full of groceries and go to her car. The car left the parking lot a couple of minutes later. (12/1959, 1960, 1964)

Dr. James Briles, the husband of Kathleen Briles, was working

on August 3, 2009. The last contact Dr. Briles had with Kathleen Briles was a mid-day phone call when everything was fine. They had a carpenter working at the house daily. The carpenter did not come that day. (12/1964, 1978) Dr. Briles left his office around 6:30 to do rounds at Manatee Hospital. (12/1964) James Briles headed home around 7:30 p.m. and found Kathleen's car parked in his normal spot. James had to use his key to unlock the back door to enter the house. After turning on the kitchen light, James realized Kathleen was lying on her stomach, with her hands bound behind her back in duct tape, her ankles wrapped in duct tape, and a gag around her face. She was cold and not breathing. She had no pulse and her face was deformed. Dr. Briles knew she was dead. (12/1970-1972) It was stipulated that the victim was Kathleen Briles. (V13/2141)

A cast iron antique Singer sewing machine, normally in the study closet, was on the floor behind her head. There was blood from her head to the wall. Dr. Briles called 911, and stayed on the line with the operator until the deputies arrived. (12/1973-1979, 1992, 1993) Dr. Briles exited the house out the front door which had been locked. (12/2003)

The furniture was disheveled and the normally open blinds were closed. (12/1982) Photographs of the scene were admitted into evidence. (12/1981-1985, 1990, 1992, 1993) The bed in the master bedroom was messed up and several items were on the floor. Things were out of order, drawers were open. (12/1985-1987) A jewelry case and box that Ms. Briles kept fine items in should have been

full of jewelry. (12/1989) Closet doors and drawers that were normally closed were open. (12/1991, 1992) Blood was on the rocking chair, loveseat, and the floor behind the loveseat. The rocking chair was moved and Kathleen's glasses were on the floor by the rocking chair. There were scratches and dents on the wall and floor. (12/2005, 2006)

The door of the shed in the back of the house, normally closed, was open. The shed had been entered, drawers were open and gray duct tape was missing. (12/1994, 1995) Most of Kathleen's jewelry, including her wedding ring that was on her hand, was missing. Diamond necklaces, gold necklaces, silver necklaces, wrist watches, and rings valued at $30,000 to $40,000 were missing. Law enforcement later showed a necklace to James that was a diamond baguette necklace he bought for his wife many years ago. (12/1996, 1997) Kathleen carried her house keys and car keys on two separate key rings. Her house keys were on a Minnie Mouse key chain but most recently the Minnie Mouse key chain was in her top drawer in the master closet. James had given Kathleen the Minnie Mouse key chain for their anniversary in June of 2009. (12/1998, 1999)

Dr. Briles recognized state's exhibit JJ-4 as a padlock keyhole that was in a wooden coin caddy in his bedroom closet. Exhibit JJ-2 was a special set of nickels given to Dr. Briles by a patient. (12/2001) Dr. Briles looked for Kathleen's keys and found them just two weeks before the trial when he was raking leaves near the shed. (12/2002) Kathleen gave James a watch with a gold

and silver band, but he did not wear the watch. Exhibit AW-62 was a medical encyclopedia that James believed his wife got at a yard sale. James never used the book. His son Calvin Briles borrowed the medical encyclopedia in May of 2007 and returned it in May of 2009 before Kathleen was killed. The corners of the book did not line up, and the cover used to return to a particular position but no longer did so because it had been manipulated so much. (V12/2003, 2004, 13/2264-2267) Exhibit PP-99 was a picture of the medical book on the bottom shelf. (12/2005)

Deputy Andrew Hasty of the Manatee County Sheriff's Office was the first deputy to arrive at the Briles' residence on August 3, 2009. (12/2009, 2010) Dr. Briles' hands and shirt were covered in blood. Dr. Briles was in shock, and white as a ghost. He kept repeating, "she's dead." (12/2011) Hasty went in the house with Deputy Byington and cleared the house room by room to make sure no perpetrator was there. Hasty did not see anyone in the house other than Mrs. Briles on the living room floor. She was lying face up in front of the couch. Her arms were underneath her behind her back and her legs were straight out. Hasty could tell Mrs. Briles was dead just by looking at her. (12/2012) There was a lot of blood; some dry and some wet. Hasty secured the scene. (12/2013)

Crime scene technician Adriana Walls was in charge of documenting Kathleen Briles' position and assisting with the investigation. Photographs of the crime scene, including photographs of the body and sewing machine, were admitted into evidence. (12/2027-2032) The sewing machine was admitted into

evidence. (12/2036, 2040)

Richard Talbot, crime scene unit manager, arrived at the crime scene about 8:55. Talbot saw a female's purse and a Publix receipt on the front passenger seat of a gold Oldsmobile Intrigue. (12/2041-2044) There were grocery bags containing cold food from Publix in the trunk of the car. The receipt and photographs were admitted into evidence. (V12/2045-2047)

Talbot entered the house about 10:40 that night. Talbot saw the body and the largest volume of blood around the head, neck and chest area. The most outstanding object near the body was the steel sewing machine on the floor. There appeared to be blood on the sewing machine. (12/2048, 2049) Talbot did blood spatter analysis and determined that the impact blood stains were from an area of origin low to the ground. The round type stains on the couch were consistent with Kathleen Briles being close to the ground when struck. (12/2053-2055)

Talbot had contact with and took some photographs of Dr. Briles. Dr. Briles had blood on his hands and some blood on his tie. Talbot did not see any fresh bruises or lacerations on Dr. Briles. (12/2055, 2056)

The owner of Roadkill Auto, Inc., sold a tan Blazer and a red Hyundai to Delmer Smith in 2009. Smith traded the Blazer in for the red Hyundai on August 31, 2009. (14/2287-2290) Detective Kumiko Carter of the Manatee Count Sheriff's Office located the tan Blazer in January of 2010. (14/2290-2294) Talbot and Walsh processed the Chevy Blazer on January 25, 2010. They did not find

any blood stains in that vehicle. Three days later they did luminol testing for blood on the vehicle. There were areas that luminesced but they all tested negative for blood. (12/2056-2058)

Crime scene technician Grace Givens attended the autopsy of Kathleen Briles performed by Dr. Broussard on August 4, 2009. The only jewelry Givens observed on Briles was earrings. (12/2060-2063) Dr. Broussard cut off the duct tape that was on Briles' neck, wrists, and ankles. Givens photographed and bagged each section of duct tape that was cut off. Swabs were taken off the wrists and ankles of Briles. (12/2064, 2065) Several days later Givens attempted to lift latent prints off the duct tape. Givens took photos of the ridge detail found on the outside of the duct tape from her wrists. (12/2067-2070) The blood on Kathleen Briles' right breast and upper right leg was consistent with transfer from five fingers of a hand. (12/2071) The jury was allowed to view and lift the sewing machine to feel its weight. (12/2074)

Crime scene technician Hurly Smith and Detective Foy went to Intertape in South Carolina to video how duct tape is made, because there was an unexplained fingerprint on recovered duct tape. (12/2075; 14/2312, 2316) Oliver Young, the product manager of Intertape Polymer Group, is familiar with the duct tape manufacturing process. There are other plants that produce duct tape. Young was not aware of any significant variations between plants in how duct tape is manufactured. During the manufacturing process, ungloved hands come into contact with the duct tape. (12/2078, 2079) A person manually manipulates the strip of tape to

get the roll started. (13/2084) Ungloved hands will come into contact with the tape using the automated converter. (13/2085, 2086) Employees' fingerprints could be at the beginning where they start a roll or it could be midsection. They could have their hands on the tape anywhere in the process. The actual fingerprint handling of the tape is at the very beginning of the roll. (13/2089)

The medical examiner, Dr. Broussard, arrived at the scene of the homicide at 10:20 p.m. on August 3, 2009. (13/2097) Broussard saw the sewing machine near the body. Broussard later determined the sewing machine to weigh 23 pounds. Broussard observed Briles' hands duct taped behind her back and her ankles were bound in duct tape. (13/2098) Rigor mortis was present in Briles' extremities when Broussard examined her at 12:20, about two hours after he arrived. (13/2099) The house was 80 degrees inside and Broussard felt no appreciable warmth at the underarm of Briles' body. (13/2100) Broussard determined that the death occurred somewhere between approximately noon and 7 or 8 p.m. (13/2101)

Broussard conducted the autopsy on the morning of August 4, 2009. Photographs were taken during the autopsy and used during Broussard's testimony. (13/2101, 2104) Briles was 5'3" and 142 pounds. Broussard observed multiple injuries on Briles. (13/2102) Broussard believed that Briles was alive when she bound with duct tape. (13/2107) There was purple bruising around the elbow that was typical of an injury before death and likely occurred near the time of death. (13/2108-2110)

There was a laceration above the left eyebrow and areas of contusion and slight abrasion. There was another abrasion on the tip of the nose consistent with having occurred while alive. The most likely scenario for injuries above the eyebrow is that they occurred while face down sustaining several blows to the back of the head. The jaw was fractured on the right and left sides. (13/2111, 2112) There were a couple of areas of one to three inch abrasions on the back of the upper neck and shoulder region. (13/2114) The injuries to the right side of the head were consistent with being struck directly with the sewing machine a minimum of four to five times. A minimum of four to five blows caused the Y shaped laceration in the back of the head. A single blow caused another head injury. (13/2117-2119)

There was a five to six centimeter laceration to the liver. The 500 millimeters of liquid blood present indicates the liver was injured while Briles' heart was still beating. (13/2120, 2121) There was no external injury that corresponded to the lacerated liver. Something blunt like a kick or knee to the abdomen caused the liver injury. The impact of this injury alone would not have caused loss of consciousness. (13/2122)

Broussard determined Briles was face down on the floor while being struck with the sewing machine several times. The scalp was lacerated several times causing her to bleed extensively. There was no blood on the tape, so it appeared more consistent with her being bound prior to being struck. There was blood on the tape around the face. (13/2129) Broussard could not determine which

blow came first or which blow caused the death. The first blow could have caused the death, if it was a major blow, or it could have been a combination of several blows. There is no way to tell how long the victim was conscious after the first blow. (13/2130) The cause of death was multiple blunt force head trauma. (13/2131)

It was stipulated that no DNA of Kathleen Briles was discovered by laboratory analysis on items taken into custody that were in the possession of Martha Tejeda, Michelle Quinones, and Pawn Star. No DNA of Delmer Smith was detected by laboratory analysis done in this case. (13/2141, 2142)

Martha Tejeda knew Delmer Smith by the name Dee. They were more than friends. In August and September of 2009, Tejeda lived at 3712 Bobko Circle in North Port, Florida. Smith lived with Michelle Quinones about three houses away from Tejeda. In September of 2009, Smith drove a red car and before that a Blazer SUV. After Smith went to jail, he called Tejeda and asked her to get some of his property, including a big duffle bag, from storage. Tejeda listened to the recordings of the jail phone calls and identified Smith's voice in the calls. The recorded phone calls were admitted into evidence and published to the jury. (13/2156, 2160, 2172)

During the phone call of 9/11/09 at 2038 hours, Smith told Tejeda that he needed her to go to his storage and get all his duffle bags. His clothes and stuff were in the bags. He later told her to open the bags and take the one containing his clothes. Smith told her she could go back later and get the rest of his

stuff. The storage unit was paid up for three months, so they had time to get the rest of the items out of the unit. (13/2174, 2175, 2178)

Smith spoke to Tejeda again that day at 2222 hours. Smith told Tejeda to take all the bags tomorrow. He said there was a small laptop in one of the bags. There is something inside one of the bags and it was very important that she get it out the next day. (13/2198)

The next call was 9/12/09 at 11:34 hours. (13/2201) Smith told Tejeda that she needed to pick up the car that day. (13/2202) Next call was at 1539 hours. (13/2205) Tejeda had picked up his dogs and was going to go to the storage. Smith told her he would call her back in one hour when she was at the storage unit so he could tell her what he needed her to get. (13/2207) Smith called back at 1620 hours. Tejeda was at the front door of the storage unit. Smith guided her to the second red box on the wall. (13/2210, 2212-2214) Tejeda saw the bags. Smith told her to take all the bags but she needed to open the big bag herself. Smith told her to take the bag to the house. (13/2215-2217)

Smith called back at 1651 hours. (13/2218) Tejeda told Smith she took everything. (13/2218) The last call was on 9/15/09 at 2011 hours. (13/2219) Tejeda told Smith she was going to the police because they were coming for her. She said the police were there and took a picture of Smith's car. Smith told Tejeda that she never got anything out of his storage and that she didn't know anything about that. (13/2220-2222)

Tejeda retrieved the big duffle bag from storage and put it in her attic. A photo of the bag and its contents was admitted into evidence. Tejeda looked inside the bag and saw a lock box. (V13/2161, 2162) Tejeda brought Smith's car to her house and put it in her garage. She never cleaned the car out or took anything out of the car. Tejeda saw the blue medical encyclopedia among Smith's property. (13/2163, 2164) After Tejeda took items from the storage shed to her house, the police came to her house and she gave all of the property to the police. Tejeda gave the car to the police the first time they came. (13/2154, 2165) There were no clothes in the big red bag. (13/2166) Smith told Tejeda that he bought the electronic items that were in storage at a pawn shop.

Jessica Jarecki, a crime scene technician for Sarasota County Sheriff's Office, and her co-worker Jessica Henderson went to Tejeda's house in North Port on September 16, 2009. Henderson went into the attic of the house, and removed containers and bags. (13/2224, 2225, 2226, 2240) Photos of the contents of the red bag were admitted into evidence. (13/2229) There was a Honeywell safe in the bag. (13/2229) Inside the safe was a coin collection in a plastic container, a Minnie Mouse keychain with keys, a golden color lock, and a watch. (13/2230, 2231) The items that came out of the Honeywell safe were admitted into evidence. (13/2233) Although the exact location in the attic where the blue medical encyclopedia was found was not established, it was admitted into evidence. (13/2235-2237)

Walls processed the cover and every page of the medical

encyclopedia for fingerprints. (12/2033, 2034) Ridge detail of a fingerprint was found on page 1373 of the book. (12/2035) Walls took photographs of 12 different things from the medical encyclopedia she believed were fingerprints. (12/2038) Robert Feverston, a latent print examiner, compared Smith's prints to the latent lift from the medical encyclopedia (LL1) and determined that Smith's left index finger made the print. (14/2269, 2279, 2280) Feverston found no match of Smith's known prints with LL2, 3, 4, and 5, but that does not mean Smith is excluded. (14/2281) Feverston also ran and AFIS (Automated Fingerprint Identification System) search on LL2, 3, 4, and 5 but was unable to make an identification for those latent lifts. (14/2282, 2283) A total of ten unknown prints were lifted from the medical encyclopedia. Feverston compared those prints to a list of 89 people. None of the prints belonged to any member of the Briles family or James Cellecz. (14/2284, 2285)

Detective Ned Foy met with Dr. Briles and his son Calvin on November 2, 2009, to show them video from Publix and a BP Station to see if anything would jog their memory regarding the homicide. Foy showed pictures to James and Calvin Briles of a necklace that had been pawned in Manatee. (14/2297-2300)

Foy met with Calvin Briles on November 23, 2009, and showed him a photograph of the medical encyclopedia. (14/2301) On December 4, 2009, Foy retrieved the Minnie Mouse keychain and showed it to James Briles at his office. (V14/2301) Later in that month, Foy took the gold padlock clasp and a coin set to Dr.

Briles office for him to view. Foy left and returned to Dr. Briles office that day after receiving messages on his answering machine. Foy met with Dr. Briles' nurse Marion Cleveland who produced a second set of Westward Journey Nickel Series boxed coins that were the same as the ones shown to Dr. Briles. (14/2302-2305)

In January of 2010, Foy determined the drive time from Publix to the Briles' residence in Terra Ceia was six and a half minutes. (14/2306) Foy did a forensic examination on the tan Blazer and found that all the keys on the Minnie Mouse keychain unlocked the doors and started the motor on the vehicle. Some of the keys were stamped North Port Lock and Key. Foy went there on January 26, 2010, and presented Stanley Grubbs, the business owner, a photopack with Smith in position number 6. (14/2306-2310, 2323-2325) Grubbs selected photograph number 6. Smith tried to sell some gold to Grubbs and Grubbs sent Smith to North Port Jewelry. (14/2311, 2325, 2326)

On March 18, 2010, Foy received from Detective Linda Deniro a woman's Geneva watch that was recovered from the property and evidence section of the Sarasota Police Department. (14/2313, 2314) On April 15, 2010, Foy received a print photograph from Dr. Briles of a medical encyclopedia. (14/2314)

On May 3, 2010, Foy audio-recorded an interview he did with Joshua Hull, an inmate at the Manatee County Jail. (14/2315) Foy's agency acquired cell phone records and Detective Diamond assisted Foy in reviewing the cell phone records. (V14/2315)

Michelle Quinones started dating Smith in October of 2008.

Smith moved in with Quinones at the end of November 2008 at Bobko Circle in North Port, Florida. Smith lived with Quinones until August of 2009. Smith was working when he moved in with Quinones, but he was laid off in January of 2009. Smith purchased a champagne color Blazer when he was living with Quinones. (14/2327-2329)

Quinones knows James Cellecz. She did not remember ever getting James Cellecz when she called Smith's cell phone number. Quinones knew Cellecz for about a month when she was with Smith. Smith and Cellecz would exchange, trade, or sell items with each other. (14/2331, 2336, 2337) After Smith bought the Blazer, he gave Quinones a copy of keys on a Minnie Mouse keychain. Smith never said where he got the keychain. In the fall of 2009 Smith showed Quinones a his-and-her watch set. Quinones was not very excited about the watch and she put it in her jewelry box. Quinones recognized exhibit LD1 as the watch Smith gave to her. In the fall of 2009, Quinones found a backpack in her garage that belonged to Smith. She later said the backpack was hers. There was a roll of silver duct tape in a mesh pocket that drew her attention to the backpack. The backpack contained a black hoodie, a black ski mask, screwdrivers, and pliers. (14/2331- 2333)

Smith was 5'11" and 260 pounds, solid muscle. He had a weight set on the lanai where he would work out. Smith left the house in August and never came back to live there. Quinones gave Detective Deniro some of Smith's property. Quinones put the watch in the pocket of a black jacket that belonged to Smith. She put the

jacket in a garbage bag and called Deniro to come pick it up. Quinones set the bag out for Deniro and Quinones was not home when the bag was picked up. Smith took all his other items with him when he moved out. Quinones never saw the black backpack again. (14/2334-2336)

Detective Linda Deniro, a police officer with the City of Sarasota, participated in an investigation involving Smith. (14/2338) The prosecutor asked and Deniro answered the following questions:

> Q. As part of that investigation did you speak to someone named Michele Quinones?
>
> A. I did.
>
> Q. And did she give you some of the defendant's property?
>
> A. Yes, she did.
>
> Q. How did that exchange come about?
>
> A. Regarding my investigation that I was doing for the City of Sarasota— -
>
> Q. Well let me stop you there. What I meant was, did she call you, did you call her, how did she give you the property?
>
> A. Oh, I called her, we talked, and she said she had some property she would like to turn over to the Sarasota Police Department. At that time I - -

(14/2338, 2339) At that point defense counsel objected and moved for a mistrial because the detective made reference to an investigation for the City of Sarasota which was an unrelated case. The trial court stated:

> It was a very poor choice of words by the detective. After 23 years in the force,

> she should have known better than to talk like that. I believe her exact words, we can look it up, but I believe her exact words was the investigation I was doing for the City of Sarasota.
>
> "Regarding my investigation that I was doing for the City of Sarasota" is exactly what she said.
>
> All right, in light of the fact that investigations were being conducted in multiple cities, and by multiple agencies, I don't think the jury would draw the inference that there was a separate investigation that this officer was working on behalf of the City of Sarasota for. While that is certainly a possible inference that could be drawn, in the context of this case I don't find that it rises to the level that would require a mistrial. Motion is denied.

(14/2340)

Deniro went to Quinones home on November 5, 2009, and picked up a white plastic bag that had a jacket in it. Inside the jacket pocket, Deniro found a razor telephone, a watch, and a keychain. The watch was the one that Smith gave to Quinones. (14/2340, 2341)

Gerri Cotter worked for a federal government agency and had regular contact with Smith from February 2009 until July of 2009. She had been to Smith's home at 3729 Bobko Circle approximately each month. Smith lived with Michele Quinones. Smith's cell phone number was 941-592-0538. Cotter reached Smith many times calling that number. Smith was unemployed and seeking a job. (14/2343-2345) Cotter was not familiar with James Cellecz. Cotter never dialed 592-0538 and reached anyone other than Smith. (14/2345, 2346)

Detective Jerome Diamond went to the Briles residence on Bayshore Drive and to 3712 Bobko Circle in North Port. After

reviewing cell phone data, Diamond drove to see each individual cell phone tower that was on the list of where the cell phone connected to. There was a stipulation that the cell phone examined by Diamond was taken from Delmer Smith on September 10, 2009. The cell phone, using the number 941-592-0538, was admitted into evidence. (14/2362, 2370-2374)

Smith's cell phone had contact numbers saved for Bobby, David Kimbro, Flying Brain {sic} Bike, Gerri Cotter, Jack, Josh, K, Kim Neighbor, Kim Head, Michele, Martha, and Wes. (14/2375-2379) Metro PCS provided Diamond a printout of the cell identifier number that tells which cell tower and sector a call was connected to. (14/2380) Call detail records indicate actual in and out transactions when a cell phone connects to a tower. (14/2382, 2383) Diamond also received a list of text messages sent and received on Smith's phone on August 3, 2009. (14/2385)

The subscriber name for the phone is Delmer Smith and it was activated on February 21, 2009. The account was terminated on October 11, 2009. Delmer Smith was also the subscriber for 941-592-0528 during that timeframe. This account was started on April 16, 2009, and canceled on September 3, 2009. (14/2387-2389) Call detail records for the 0538 number showed calls beginning at 9:17 a.m. and ending at 11:42 p.m. on August 3, 2009. (14/2389)

There are three antennas on each cell phone tower and the azimuth tells you what the angle the antenna is aligned on a 360 degree circle. (14/2398) On the tower located at 77 Street East, Palmetto, Florida, the three antennas are centered at 100 degrees,

195 degrees and 295 degrees. (14/2399) Diamond used a map to show connections the 0538 phone made with cell towers on August 3, 2009 from 1316 hours to 1544 hours. (14/2402-2404) The records do not tell who is using the phone. It just indicates the phone is in use. (14/2405) At 2:34 p.m. the phone connected to a tower at 690 56 Street East in Bradenton. The next connection was at 3:44 p.m. to a cell phone tower 1.24 miles, as the crow flies, from the Briles residence. It would take longer to drive because there is no bridge over the bodies of water. (14/2407-2409) The phone could have been further from or closer to the Briles residence than 1.24 miles. (14/2434) The furthest tower connection you can get is seven to eight miles. (14/2440) The Briles residence is in sector 3 and the call at 1544 connected to sector 3. (14/2415, 2416) This was an incoming call from 941-266-9693 that lasted six seconds and was not answered. (14/2418)

The 0538 number made four phone calls to the 9693 number on August 3, 2009. (14/2421) There were calls between these two phones that were answered at 1139 and 1153. There were calls between these to phones at 1544, 1717, and 1944 that were not answered. The first call after 1544 between these to phones that was answered was at 2045. (14/2422-2424) The first call after 1544 that was answered came from 240-6812 at 1722 hours. (14/2437) There were also calls between the 0538 number and contacts listed as Jack, K, Bobby, and Wes. (14/2424-2428)

The next time segments showing calls from the 0538 number was from 3:44 p.m. until 6:44 in the evening. There were ten

connections to a tower at 15 Street East in Bradenton from 1622 hours until 1722 hours. This location is south of 77 Street East. (14/2410-2412) The next connection is at 1824 hours with De Brita Road antenna which is very close to 3712 Bobko Circle, North Port, Florida. (14/2412)

Kimberly Osborne lived in North Port in August of 2009 and was a friend of Smith. (14/2441, 2442) Osborne's cell phone number then was 941-266-9693. Osborne did not remember ever calling Smith and having someone other than Smith answer the phone. (14/2444, 2445)

Prior to Joshua Hull being called as a witness defense counsel renewed his objection that Hull's testimony is extrinsic and should not be admitted. (14/2446) The court allowed defense to have a continuing objection as to the admissibility of Hull's testimony. (14/2447)

Joshua Hull, an inmate in Manatee County Jail, has eight felony convictions and had not been given a deal to testify in court. Hull saw Smith on the transport bus returning to county jail after he was sentenced in April of 2010. That is the first time Hull had contact with Smith. Hull was sitting directly in front of Smith on the bus. They began a conversation and Smith asked Hull where he was housed. Smith asked Hull if he knew inmate James Cellecz. Hull knew Cellecz from playing cards and walking around the dorm. Smith told Hull to tell Cellecz he had "something for his ass." Smith said, "tell him I still know where Stephanie and Gavin are and I have something for them." Smith said Stephanie

and Gavin are Cellecz' wife and child. Smith was upset because he had given Cellecz some jewelry and stuff to pawn and Cellecz was snitching on him. (14/2447-2451)

Hull was concerned about an observation camera at the front of the bus that was close to where he was sitting. Hull was hoping the camera did not have audio because someone was asking him to communicate a threat. (14/2454) Hull was brought to Manatee County Jail in March. He had known Cellecz for about two months. A week or two before Hull testified, he wrote a letter to the State Attorney saying that the prosecutor was supposed to communicate some interest that Hull had regarding testifying at trial. Hull was trying to use his testimony to benefit himself. (14/2454-2459) Hull wrote:

> I am the cooperating witness in your office's highest profile case at present. I am sure you're familiar with my involvement at this point. I consider my testimony and willingness to provide it as evidence of an almost paramount importance. My testimony, coupled with Mr. Cellecz's testimony, represents a great obstacle to the defense. The significant value here is not lost on me, nor do I believe it is lost on you either. Otherwise, you wouldn't have brought me all the way from my correctional facility in Miami.

(14/2460) Hull went on to ask for a reduction of his sentence from five years to three years or a transfer to a closer facility. (14/2461, 2462)

When Hull returned to the county jail he went to Cellecz and told him what Smith had said. Hull did not go to law enforcement with this information, but they eventually came to him. The area

sergeant came to Hull that evening. Three or four days later, Detective Foy came and talked to Hull. Hull did not ask for any special deals when he talked to Foy. (14/2452)

James Cellecz is a computer repair technician. Cellecz had been convicted of six felonies and was on probation when he testified. In August of 2009 he was 5'06" and about 145 pounds. Nancy Peirce found a buyer for a television that Cellecz was trying to sell. The buyer was Delmer Smith. Cellecz met Smith in 2009. Cellecz informed Smith of his background in computers. Cellecz met Smith's girlfriend Michele Quinones and had been to her house. Quinones was a DJ and Cellecz worked on a computer she used in her business. (14/2473-2476, 2479, 2480) Cellecz never rode motorcycles with Smith and had never been to Peggy's Corral in Palmetto. Cellecz did not know Helene Milligan, Bobby White, Wesley Mills, Kimberly Osborne, Joshua Koch, or Eugene McDaniel. Cellecz had met Bryan Illyes but he never called him on the telephone. (14/2477, 2478)

In 2009 when Cellecz was spending time with Smith he was renting a place in Venice from David Watmough. Smith bought an enclosed trailer from Watmough. (14/2478, 15/2479) Cellecz recognized exhibit TK-1 as an item he pawned. On August 4, 2009, Smith picked Cellecz up that morning in his Chevy Blazer and they drove around doing some errands. They ended up at Pawn Stars pawn shop and Smith had a couple of jewelry pieces. Smith said he had forgotten his ID and asked Cellecz if he could pawn the jewelry items. They both went into the pawn store and Cellecz pawned the

necklace and the other jewelry. Smith chose the pawn shop. Cellecz had never been to that pawn shop before. Smith told Cellecz that the jewelry came from David Watmough. Smith said he purchased it for a hundred dollars. Smith said not to bring it up because the jewelry was from Dave's fiancée and he didn't want it known that he had taken the jewelry from her. (15/2480-282)

Cellecz took the jewelry to the counter and got a price. Cellecz conferred with Smith to see if it was a good deal. Smith gave his approval to accept the offer. (15/2482) When Cellecz was riding in the Blazer, he noticed a blue medical encyclopedia on the floorboard of the Blazer. Cellecz recognized exhibit AW-62(A) as the medical encyclopedia. Smith carried around a backpack that contained grey duct tape, gloves, and ski masks. Cellecz saw the backpack more than once. (15/2483, 2484)

Cellecz sold items to Smith such as a refrigerator, computer parts, helicopter toys, television sets. Cellecz did not sell a car radio, speakers, and jewelry to Smith. Cellecz never drove Smith's vehicle. Cellecz had a lockbox that he sold to Delmer Smith. Cellecz may have placed one or two phone calls on Smith's phone, but never outside of Smith's presence. Cellecz helped Smith fix a broken car window by duct taping a plastic bag over the opening. Cellecz did not remember where the duct tape came from. (15/2484-2486, 2493)

Cellecz had a pending felony violation of probation where his exposure was 20 years in prison on two cases. He was sentenced to 11 months 29 days in county jail. The bottom of the guidelines on

that case was 100 months imprisonment. (14/2487, 2488) Cellecz gave interviews to the police, and every one was different. Cellecz had a substance abuse problem back then. Cellecz had access to Smith's storage and took a bicycle and a GPS out of Smith's property when Smith was incarcerated. Cellecz denied breaking into Briles residence and killing Mrs. Briles. (14/2488-2490) Cellecz participated in a courtroom demonstration where he lifted the sewing machine. (15/2493)

Kristen Venema, Kathleen Briles daughter, was living in Bradenton on August 3, 2009. A few months after her mother was killed, Detective Foy showed Venema some jewelry and she was able to identify the necklace immediately. Pictures were admitted into evidence showing Venema wearing the necklace for her prom and Briles wearing the necklace at Venema's wedding. (15/2496-2498)

Eugene McDaniels met Michele Quinones when he was working at PGT. She introduced Smith to McDaniels and on occasion Smith would come and hang out at McDaniels' house. McDaniels did not remember receiving phone calls on August 3, 2009 at 12:57 and 1:16 p.m. McDaniels had never met Cellecz before the day he testified in court. (15/2499-2503)

Joshua Koch worked at Publix on Manatee Avenue in 2009. Koch rode a motorcycle and met Smith while on a smoking break at work. They formed a friendship, exchanged phone numbers, and rode motorcycles together a few times. They would occasionally call each other on the phone. Koch did not know Cellecz. (15/2504-2508)

Bryan Illyes, nicknamed Flying Bryan lived in North Port in August of 2009. Illyes rode motorcycles with Smith and Wesley Mills. They would ride to Peggy's Corral on Sundays. Illyes did not know Cellecz. Illyes never received a call from Smith's cell phone where it was someone other than Smith. Illyes did not recall receiving a call from Smith or making a call to Smith the evening of August 3, 2009. (15/2509-2512)

Jack Jones knows Smith, Kim Jacques, and Bobby Witte. Jones had phone contact with Smith in the summer of 2009. (15/2514-2517) Wesley Mills identified his phone number on exhibit JD-2. Mills did not recall receiving calls from Smith around 10:43 on August 3, 2009. Mills did not recall receiving a call where caller ID reflected the call was from Smith and the person speaking on the other end was someone other than Smith. (15/2517-2521)

Robert Witte's phone number showed on Smith's contacts as Bobby. Witte never had anyone other than Smith answer the phone when Witte called Smith. Witte did not know Cellecz. Witte did not recall any of the phone conversations with Smith at 1243, 1846, and 2012, on August 3, 2009. (15/2532-2535)

Kimberly Jacques' phone number appeared in Smith's contacts as K. Jacques. She did not recall any phone conversations she had with Smith on August 3, 2009, at 2100 and 2230 hours. Jacques met Cellecz through Smith. Jacques never had any phone communication with Cellecz. (15/2536-2540)

Helene Milligan was working at BP gas station in the summer of 2009, where she met Smith. They exchanged cell phone numbers.

Milligan did not know Cellecz. When Milligan called Smith or received calls from Smith, she never spoke to anyone other than Smith. Milligan did not recall placing calls to Smith's phone number on August 3, 2009. (15/2540-2544)

The State rested and defense moved for a judgment of acquittal because there was insufficient evidence presented to prove that Delmer Smith is the person who murdered Ms. Briles. (15/2550) The motion for judgment of acquittal was denied. (V15/2550, 2551)

PENALTY PHASE

Robert Feverston, latent print examiner, compared the known prints of Delmer Smith with those on State's exhibits M8, M9, and M12, copies of prior violent felony convictions. These exhibits were moved into evidence. (5/738-745, 746, 747, 760-764; 16/2682)

Gerri Cotter was Delmer Smith's supervising probation officer from September 16, 2008, until October of 2009. The indictment and judgment of conviction relating to M8 were admitted into evidence. Cotter was supervising Smith for the offenses of bank robbery, aiding and abetting, and carrying a firearm during a crime of violence. Mr. Smith was in prison prior to coming onto probation and he was still under probation supervision on August 3, 2009. (16/2685-2689)

Nicole Mitchell lives in Canada part of the year and Sarasota part of the year. In 2009 Mitchell was renting a house on Carmilfra Drive in Sarasota. On March 14, 2009, around 10 p.m.,

Mitchell was watching TV. At 10:03 p.m. she went to the kitchen to put some things away and heard a noise. She couldn't figure out if the noise was coming from inside or outside the house and went back to watching TV. (16/2690-2695)

Mitchell felt a presence, turned around and the lights went off. She saw a big black shadow and realized it was a big person. Mitchell felt a person grab her and she started screaming. Mitchell believed the person was wearing a mask because she couldn't see the face. Mitchell was pushed facedown on the couch. The person asked Mitchell to stop screaming and if she didn't stop he had a gun and would kill her. Mitchell felt something hard like a gun on her temple. He grabbed Mitchell's whole face and tore part of her lip with his gloved hand. Mitchell pulled her wedding ring off and threw it under the couch. (16/2695-2698)

The man grabbed Mitchell by the back of the hair and asked her to give him all of her jewelry. He took her into the walk-in closet in the master bedroom to look for valuables. He told Mitchell to kneel on the floor and not look at him. He told Mitchell to cooperate and showed her the gun. He took Mitchell back into the living room and then the kitchen. When he saw the computer he told her to pack the computer and give him the password. They went into the garage to get tools so he could take the TV. They went back to the living room and he asked Mitchell to lie down on the floor. (16/2699-2701)

He took the TV set off the wall and told Mitchell he was sorry he had to do this. He grabbed an electrical cord and tied

her hands behind her back, tied her feet, and tied the whole thing around her neck so she would strangle herself if she moved her legs. He went through the master bedroom again where he found her wallet and a little money. He took her watch and made a mess of everything. He said he was going to get his partner to bring the car around. Mitchell never saw or heard anyone else. Mitchell heard a door open and she heard the car leave. He told Mitchell she should stay put because his partner was watching. Mitchell lied still for a long time and then was able to get her right hand out of the cord and then untie her legs. Mitchell ran to her neighbor's house to get help. Mitchell testified at the trial of Delmer Smith. He was convicted and received a life sentence. (16/2702-2704) The jury heard victim impact statements from the victim's family members. (16/2707, 2709)

Defense called Alicia Phillips who is Smith's niece. Phillips is close to Smith and loves him very much. Phillips lived with Smith and her grandparents from the time she was born until she was 10 or 11. Smith came to Phillips' aid when Phillips was getting spanked and her nose started bleeding. Smith would always come to her aid. A picture of Phillips and her uncle that she keeps on Facebook was admitted into evidence. Smith was her favorite uncle. He would give her presents and take her out. Smith tried to guide her in the right direction. He made her promise that she would finish school and refrain from having babies at a young age. (16/2721-2725)

Phillips continued to communicate with Smith while he was in

prison for about 15 years. Phillips would write letters and visit Smith with her grandmother. After her grandmother, Smith's mother, passed away, it was more letters and phone calls. Smith was in prison when his mother and father died. Phillips attributes the fact she can take care of herself and her daughter to the guidance provided her by Delmer Smith. Smith is someone who has guided her in life to do the right thing and she still loves him. (16/2725-2728)

Christina Smith is Delmer Smith's niece. Christina Smith lived with her grandmother, Delmer Smith's mother, when growing up. Christina Smith was too young to know that Delmer Smith went to prison for a long time. She just knew he was away. Christina Smith learned about Delmer Smith being in prison when she was older and she started writing to him. Christina wrote to Smith a lot through her teen years. Christina would speak to Smith on a regular basis on the telephone and he would always ask how they were doing and wanted them to stay out of trouble. Smith provided guidance to Christina during the phone calls. Christina loves Delmer Smith and credits him a lot with her being able to take care of herself. (16/2729-2734)

Dr. Hyman Eisenstein, a licensed psychologist, evaluated Delmer Smith on two occasions in July of 2012. Eisenstein conducted a neuropsychological evaluation to determine if Smith had any deficits or impairments of brain functioning. (16/2735-2738) Eisenstein administered standardized tests and scored them to arrive at his conclusions in this case. Eisenstein also

reviewed reports, previous testing, obtained background information, and school records to get a better picture of Smith's life in its entirety. (16/2738-2743) Mr. Smith repeated the 2nd grade, 3rd grade, 4th grade, and 5th grade. This is virtually unheard of repeating grade after grade. By the time he was 14 he was in 5th grade. Finally in the 5th grade he was promoted to the 9th grade to go into special education in the Detroit system. (16/2744)

IQ testing at that time revealed a verbal IQ of 70 which is borderline, meaning if he obtained a 69 he would be in the mentally retarded range. He had a performance IQ of 86 and full scale IQ of 75 which is borderline. His overall intellectual abilities were extremely low. Smith had attention deficit disorder which was virtually unknown back in 1986 and he was not treated. His lack of impulse control was never treated and was an issue that plagued Smith his entire life. (16/2745)

Eisenstein reviewed a three page summary report of psychologist John Deluca which indicated Smith had problems of poor impulse control and was emotionally impaired. There were reports that Smith suffered from physical, emotional, and sexual abuse. Smith was bi-racial with a white mother and a black father. Smith was called derogatory names referencing his racial status which were demeaning and abusive. (16/2745, 2746)

Eisenstein concluded that Smith has several major issues that have plagued him his entire life. He has Attention Deficit Disorder Hyperactivity and academic failure. He was really out of

school by the time he was 14. He wasn't treated for any learning disabilities until he was 14. Five or six years had passed before the issues were starting to be addressed. Smith had borderline intelligence almost in the mild mental retardation range. To his credit, Smith did a lot of self improvement while he was in federal prison. He took many classes and tried to better himself. In the testing Eisenstein did, Smith's full scale IQ score had increased from 75 to 89, verbal from 79 to 80, and performance from 86 to 96. Eisenstein attributes the improvement to the 14 years Smith spent in federal prison trying to obtain better skills. (16/2747-2749)

Eisenstein opined that Smith has unequivocal brain damage. The objective neuropsychological testing indicates that Smith has brain impairment. Although Smith was able to improve his IQ, his basic brain functioning for judgment, reasoning, problem solving ability, executive functioning, and higher critical processing of information were three and four standard deviations from the norm which put him in the bottom 2 percent of the population. Smith's decision making ability and his ability to process information is profoundly impaired and indicative of cognitive neuropsychological brain impairment. (16/2749, 2750)

Eisenstein could only hypothesize about the origins of this brain damage. It is possible there was some impairment in utero. From birth and early age on, there was some significant impairment. Prior to this offense, Smith was in a motorcycle accident where he suffered a contusion and head trauma. Smith was

not admitted overnight in the hospital and there was a negative CT scan of the brain. There are many sources of head trauma and it is cumulative. Looking at a time line, there were problems all along. Smith demonstrated frontal lobe problems. Frontal lobe is the part of the brain that controls inhibition. Although Smith technically meets the definition of anti-social personality disorder, that is not Eisenstein's diagnosis. Eisenstein thinks it is better explained by his brain pathology that is so clearly demonstrated from the neuropsychological tests. There is another diagnosis called intermittent explosive disorder, which is in the Diagnostic and Statistical Manual. (16/2750-2754, 2780)

Smith's behavior in prison was excellent. He had no episodes of major violent disorder and over a long period of time his behavior was in control. This does not change Eisenstein's diagnosis of brain impairment because in a controlled environment one doesn't have to exercise the amount of self control as in the free world. In a prison environment the controls put on the individual help negate the possibility of engaging in that type of irresponsible out-of-control behavior. Eisenstein thought Smith did plan the robbery, but not very sophisticated planning, and that was separate from the impulsivity which led to the violence. Eisenstein hypothesized that when confronted with the situation, Smith's reaction was sort of shock. Smith got himself involved further because of his inability to step away from a bad situation. That is where the frontal lobe plays a part in terms of the violent act. There was no pre-planning; it was just reactive

to a bad situation that went even worse. (16/2754-2756)

There are varying degrees of brain damage. There are injuries that are not obvious. People are walking and talking and seem to be okay, but they are far from okay. Because Smith suffered from brain impairment and intermittent explosive disorder, Eisenstein recommended further testing including MRI, PET scan, and EEG. Eisenstein believed these tests would demonstrate abnormalities consistent with the neuropsych data and explain Mr. Smith's behavior from a brain pathology model. (16/2756-2758)

Smith tends to downplay his impairments and wants to appear normal. Even though he was able to work hard and obtain skills he continued to demonstrate profound brain impairment. (16/2759-2761) Smith has intermittent explosive disorder and Attention Deficit Disorder. Eisenstein was of the opinion that Smith committed the crime while under the influence of extreme mental or emotional disturbance and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (16/2784, 2785)

The State called Dr. Wade Myers on rebuttal. He is a medical doctor and professor in the psychiatry department at Brown University. (16/2791) Psychiatry is a subspecialty of medicine that deals with the diagnosis, assessment, and treatment of mental disorders. Myers is not a psychologist and does not have training in that field. (16/2795)

Myers reviewed training school records of Smith, prison records, medical records, healthcare records, and trial

transcripts in reaching an opinion on Smith's mental functioning. Myers also reviewed Eisenstein's report and the raw data from his testing. (16/2796) Myers diagnosed Smith as having antisocial personality disorder. Smith met just about every criteria for antisocial personality disorder. His prison disciplinary records did not support Smith being an impulsive person, but a person who is well in control of his impulses. Myers saw no record of Smith being in fights while in prison. There was an indication that Smith was treated for a sprained ankle and knee pain from participating in sports. Smith had not been treated or diagnosed for mental disorders while in prison. (16/2800-2803) None of the prison records revealed brain impairment or a diagnosis of intermittent explosive disorder. (16/2804)

When Myers met with Smith two days before Myers testified, Smith appeared to be very angry, frustrated, and hostile, but he did cooperate with the evaluation. When questioned about family history, Smith asked to keep his family out of it and Myers honored that request. After Smith took the first part of a test that showed he was oriented, Myers stopped his testing because it appeared that Smith was not in the mood to take any tests from Myers. Myers spoke with Smith for about an hour and 15 minutes. (16/2806, 2807) Smith's language and ability to comprehend was normal. Smith said there was nothing wrong with his brain and that his brain was fine. After his motorcycle crash in July of 2009, Smith was oriented in the emergency room and his mental status was normal. Myers did not see him having any repercussion from the

accident. Mild brain injuries completely resolve within days to weeks, rarely months in 90% of the cases. (16/2808, 2809)

Smith showed restraint and self control in the robbery and kidnapping of Nicole Mitchell by deciding to leave her bound and do no further harm. Smith was problem solving and flexible in his thinking. He demonstrated good impulse control by talking to her and not hitting her to make her be quiet. Smith was clearly exercising free will when he killed Kathleen Briles. Smith made the decision to go get something with which to kill her, decided to bludgeon her with a heavy sewing machine, and repeatedly bludgeoned her to death. (16/2811, 2812)

Myers found no evidence of brain damage because Smith could function adequately without problems in life. Myers concluded that Smith has an average functioning brain with extra talents in the area of mechanical thinking and electronics. (16/2812)

SUMMARY OF THE ARGUMENT

Issue 1. The trial court erred in denying Delmer Smith's motion for judgment of acquittal. The State's only evidence of Smith's guilt was circumstantial. Smith's fingerprint was found on the medical encyclopedia. Calvin Briles testified the medical encyclopedia used to lay a certain way but no longer does. No fingerprints of Briles family members were found on the encyclopedia to conclusively prove that was the same encyclopedia. Items identified as coming from the Briles home were found among Smith's belongings in a lockbox retrieved from a storage unit by Tejeda. James Cellecz, the person who pawned Briles' necklace, sold a lockbox to Smith. Cellecz also had access to Smith's storage unit.

There was no physical evidence placing Smith inside the house where Kathleen Briles' body was found. Cell phone records placed Smith's cell phone in the vicinity of the Briles residence at the time of the murder but the cell phone records do not place Smith inside the house. There was an unidentified fingerprint on the duct tape used to bind the victim. The unidentified fingerprint and lack of physical evidence placing Smith inside the house are consistent with the hypothesis that someone other than Smith committed the crimes. Because the State's evidence was not inconsistent with any reasonable hypothesis of innocence, it was insufficient as a matter of law to sustain the convictions. The

trial court violated Smith's due process right to proof beyond a reasonable doubt of his guilt when it denied his motions for judgment of acquittal. The convictions and sentences must be reversed, and this case must be remanded with directions to discharge Smith.

Issue 2. The trial court erred in denying Smith's motion for mistrial when Detective Deniro testified she was doing an investigation for the City of Sarasota. Sarasota is in Sarsota County, a completely different county from where the charged crime occurred. Deniro's testimony conveyed to the jury that Smith was being investigated for other crimes. It is reversible error for the jury to find out about other crimes because of risk the extrinsic evidence will become a basis for a conviction rather than proof of the charged crime. This case must be remanded for a new trial where there is no mention of the Sarasota investigation.

Issue 3. The trial court erred in allowing Joshua Hull to testify regarding statements Smith made that were allegedly threats to prevent Cellecz from testifying. None of the language Smith used mentioned Cellecz not testifying at trial. Smith's statements were too vague to be construed as threats. Any probative value of Smith's statements to Hull was substantially outweighed by unfair prejudice and should have been excluded. Smith is entitled to a new trial.

Issue 4. The trial court erred in denying Appellant a continuance to obtain a fingerprint examiner to examine the

medical encyclopedia. The only fingerprint evidence from Smith was found on the medical encyclopedia. It was reversible error for the trial court to deny Appellant time to obtain a fingerprint expert or have Ramos testify to establish Smith possessed that encyclopedia while in federal prison.

Issue 5. The trial court erred in finding the murder was heinous, atrocious, and cruel where the medical examiner testified the first blow could have killed the victim, and it was impossible to tell how long the victim was conscious.

Issue 6. The trial court erred in rejecting the two statutory mitigating circumstances that 1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; 2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Although the State presented evidence that Appellant did not have brain damage, the State's experts did not have the training to refute the findings that the neuropsychological tests indicated that these two statutory mitigators were proven by the greater weight of the evidence.

Issue 7. Florida's capital sentencing proceedings are unconstitutional under the sixth, eighth and fourteenth amendments of the United States Constitution pursuant to Ring v. Arizona.

ARGUMENT

ISSUE I

THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO PROVE THAT DELMER SMITH KILLED KATHLEEN BRILES.

Introduction

The State failed to exclude the reasonable hypothesis of innocence that someone other than Delmer Smith killed Kathleen Briles. Although the State proved that Briles was killed, the State did not prove that Smith was the perpetrator of the crime.

The State proved that Smith's cell phone was in the vicinity of the Briles' residence on the day Kathleen Briles was killed. This circumstantial evidence did not prove that Smith was ever inside the Briles' residence. Smith fingerprints, footprints, hair, or DNA were not found inside the house. Briles' body was found on the floor of the living room with blood on the floor and splattered on the couch. Even though there was a bloody crime scene, no blood was found on any of Smith's clothing or in his vehicle.

Smith was not found personally in possession of any of the items taken from Briles' house. James Cellecz was in possession of and pawned a number of items the day after the killing, including a necklace taken from Briles' house. Cellecz claimed that he received the necklace from Smith and Smith was with him when he

pawned the items. The pawn shop clerk did not testify to establish Smith was there and no video surveillance was shown. It was nearly a month after Briles was killed that items taken from her residence were found with Smith's belongings. There was a Honeywell lock box inside one of Smith's gym bags. (13/2229) Cellecz had sold a lock box to Smith. (15/2493) Inside the safe was a coin collection in a plastic container, a Minnie Mouse keychain with keys, a golden color lock, and a watch. (13/2230, 2231) The blue medical encyclopedia was found in the attic and admitted into evidence.

The State's evidence raised a reasonable hypothesis that someone other than Smith was responsible for the murder of Kathleen Briles. There were no fingerprints on the sewing machine, the alleged murder weapon. There was an unknown fingerprint on the duct tape used to tie up Briles. The fingerprint did not belong to Smith. The State presented evidence that the fingerprint could have been placed on the duct tape during the manufacturing process. This is merely a possible explanation for the unexplained fingerprint, but that evidence did not eliminate the reasonable hypothesis that the fingerprint was placed on the duct tape by the killer of Briles, not Smith. Under these circumstances, the trial court violated Smith's constitutional right to due process of law by denying defense counsel's motions for judgment of acquittal.

The Law

The due process clauses of the United States and Florida constitutions required the State to prove the identity of the

perpetrator beyond a reasonable doubt. See U.S. Const. amends. V and XIV; Art. I, § 9, Fla. Const. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). "The state bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt." Long v. State, 689 So.2d 1055, 1057 (Fla. 1997). "A fundamental principle of our criminal law is that the prosecutor must establish beyond a reasonable doubt the identity of the accused as perpetrator of the charged offense." Owen v. State, 432 So.2d 579, 581 (Fla. 2d DCA 1983).

The standard of review for the denial of a motion for judgment of acquittal is *de novo*. Pagan v. State, 830 So.2d 792, 803 (Fla. 2002), cert. denied, 539 U.S. 919 (2003). A special standard of review applies when the only evidence of guilt is circumstantial. Darling v. State, 808 So.2d 145, 155 (Fla. 2002); Jaramillo v. State, 417 So.2d 257 (Fla. 1982). "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977); Darling, at 155; Jaramillo, at 257.

If the State does not present evidence inconsistent with the defendant's hypothesis of innocence, no view that the jury may lawfully take of the evidence favorable to the State can be

sustained under the law; the State's evidence would be insufficient to warrant a conviction as a matter of law. Darling, at 156. "Circumstantial evidence must lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged." Cox v. State, 555 So.2d 352, 353 (Fla. 1989) (quoting Hall v. State, 90 Fla. 719, 720, 107 So. 246, 247 (1925)). "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction." Cox, at 353.

In Jaramillo v. State, 417 So.2d at 257-258, police found the bodies of two victims who had been shot in the head in the dining-living room area of their residence. The medical examiner determined that the deaths occurred between 2:00 a.m. November 30 and 2:00 a.m. December 1, 1980. The male victim's hands had been tied behind his back with cord, and the female victim's hands had been handcuffed. The only proof of Jaramillo's involvement in the murders was that his fingerprints were found on a knife on the dining table, on the packaging for a knife found near a coil of cord similar to the cord used to tie the male victim's hands, and on a grocery bag near the table. Identifiable fingerprints which did not belong to Jaramillo were found on the handcuffs, the knife wrapper, and in the area of two bedrooms and closets which had been ransacked. Jaramillo testified that the victim's nephew, who lived with the victims, asked him to help straighten the garage on November 29. While stacking boxes, Jaramillo asked the nephew if he had something to cut them so they could be more easily stacked.

The nephew said there was a knife inside a bag on the dining room table. Jaramillo took the knife out of the bag, removed the wrapper, and left the wrapper in the dining room. He used the knife to cut some boxes, put the knife back on the dining room table, and went home around 10:00 p.m. Jaramillo was convicted of the murders and sentenced to death. This Court reversed and remanded with instructions to discharge him because the State's evidence was not legally sufficient. The State's fingerprint evidence was not inconsistent with Jaramillo's reasonable explanation, and the State failed to establish that the prints could only have been placed on the knife, wrapper, and bag at the time the murder was committed.

In Ballard v. State, 923 So. 2d 475 (Fla. 2006) the bodies of two victims (Jones and Patin), who were beaten to death, were found in the master bedroom and spare bedroom of their residence. Ballard's fingerprint was found on the frame of a waterbed in the master bedroom of the victims' apartment, near one of the victims' bodies. Multiple hairs were found in Jones' hand and one of the hairs was consistent with Ballard's arm hair and matched his DNA profile. A barbell and curl bar, both with a bloody fingerprint, were found in the spare bedroom. None of the fingerprints on the barbell and curl bar were identified as Ballard's. The investigators were unable to determine how the apartment had been entered and what weapon was used to commit the murders. The cause of death to both victims was blunt force trauma to the head.

Two weeks prior to the victims' deaths, a gang member along

with two other men shot through the victim's apartment window. It was known that Jones sold marijuana and the transactions usually occurred in her bedroom. Harralambus went to Jones apartment on March 6, 1999, around 10 p.m. Harralambus testified she saw that Jones had over a thousand dollars in the apartment on Saturday night. Harralambus and Daily were supposed to go out on Jones' boat on Sunday. Jones car was not at her apartment and they were unable to contact Jones on Sunday. On Monday Corporal Sanner found Jones' car in the woods at the back of a vacant lot on Painted Leaf Lane. The car had not been reported stolen and the ignition did not appear to be tampered. Blood and fingerprints were found in the car. The blood was Patin's and the fingerprints did not belong to Ballard. Ballard had lived on Painted Leaf Lane with his father-in-law in 1994. Ballard's father-in-law moved in 1996. The vacant lot was about a mile from Ballard's current residence.

Lieutenant Gawlinski examined Ballard's vehicle several months after the murders and did not find any blood. This Court reversed and remanded with instructions to enter a judgment of acquittal because the State's evidence was insufficient to support the convictions.

In the present case the State failed to prove that Smith was ever inside Briles' residence. The State's circumstantial evidence did not prove that Smith was the only person who could have committed the murder and did not eliminate the reasonable hypotheses of innocence that someone other than Smith committed the murder.

The Cell Phone Evidence

Detective Jerome Diamond reviewed cell phone data, and drove to see each individual cell phone tower that was on the list of where the cell phone connected to. Diamond was able to use cell phone records to indicate Smith's cell phone was in use and pinging off certain cell phone towers on August 3, 2009.

. Smith's cell phone had contact numbers saved and some of those people testified that they never talked to anyone other than Smith when calling his number or receiving calls from his number. That evidence alone does not establish that nobody else used Smith's cell phone. Smith had two cell phones that were active in August of 2009. Cellecz testified he may have made calls on Smith's phone while in Smith's presence. So somebody other than Smith could have been in possession of Smith's phone on August 3, 2009. The cell phone records can not tell who is using the phone; they simply indicate the phone is in use.

At 2:34 p.m. the phone connected to a tower at 690 56 Street East in Bradenton. The next connection was at 3:44 p.m. to a cell phone tower 1.24 miles, as the crow flies, from the Briles residence. It would take longer to drive because there is no bridge over the bodies of water. The phone could have been further from or closer to the Briles residence than 1.24 miles. However, none of this evidence proves that Smith's cell phone was actually inside the Briles residence or closer than 1.24 miles away. The call closest in time to when Briles left Publix which is a six

minute drive from her house was at 3:44 p.m. That was an incoming call that was unanswered so there is no proof as to who was in possession of the cell phone at that time. The first call after 3:44 p.m. that was answered came from 240-6812 at 5:22 p.m.

Even viewing the evidence in the light most favorable to the State, it would be pure speculation that Smith's cell phone was ever closer than 1.24 miles to the Briles' residence. Nonetheless, the State presented no evidence from which the jury could have reasonably concluded that Smith's cell phone could only have been inside of the Briles' residence at the time of the murder. Based upon the evidence in the record, it is not possible to determine that Smith was in possession of his cell phone or that the cell phone was ever inside the Briles' residence.

It would be a leap of faith to believe the cell pohone evidence establishes the cell phone was ever inside the Briles' residence. No fingerprint evidence proves that Smith or his cell phone were inside the house. The unidentified print found on the duct tape binding Briles could have been made by the actual killer. The State's attempt to explain away the fingerprint was merely a possible explanation, not proof beyond a reasonable doubt that the fingerprint was placed on the duct tape by a factory worker. The State presented evidence from one duct tape manufacturer that a fingerprint could be placed on their duct tape by a worker during the manufacturing process. It was not even proven that this manufacturer was the maker of the tape that bound Briles. It was not proven that workers at other duct tape

manufacturing plants do not wear gloves and hence could not place fingerprints on the duct tape. The evidence presented by the State was nothing more than a shot in the dark providing a far out explanation of how the unidentified fingerprint got on the duct tape. Because the print on the duct tape was not identified, the State's own evidence suggests that the actual killer was someone other than Delmer Smith.

The Stolen Property Evidence

The State's evidence only points to one person that was in actual physical possession of property taken from the Briles' residence. On the day after the murder, James Cellecz is the person who actually pawned the necklace that belonged to Kathleen Briles. James Cellecz indicated Smith was present with him when he pawned the necklace and several other pieces of jewelry. James Cellecz was the recipient of a very favorable plea deal, receiving a year in jail and probation when the minimum guidelines sentence was 100 months imprisonment with a potential maximum sentence of 20 years. There was no evidence to corroborate Cellecz' explanation of how he obtained Briles' necklace. The pawn broker did not testify that Smith was present during the transaction and no video surveillance was presented to show Smith was present.

James Cellecz admitted to selling a lock box to Smith. It was not until more than a month after the murder that property taken from the Briles' residence was found in a lock box amongst Smith's property. All of Briles' property could have been inside the lock box when Cellecz sold it to Smith.

The medical encyclopedia found with Smith's belongings did not have any personal identifying marks to prove that it was the same encyclopedia taken from the Briles' residence. There were no fingerprints on the encyclopedia that matched any member of the Briles family. Defense counsel was denied a continuance to have a fingerprint expert attempt the match the unidentified prints with those of Alex Ramos, an inmate in Federal prison with Smith. The State eliminated Ramos as the maker of the fingerprints, but not the palm prints, based on his facsimile prints. They were still waiting for original prints to confirm that finding. There were also unidentified palm prints found on the encyclopedia. The State did not eliminate Ramos as the maker of the palm prints because they did not have Ramos' palm prints to make that comparison. If the defense had been given time to establish Ramos' prints were on the medical encyclopedia that would have proved the encyclopedia came from the federal prison where Smith was housed and not from the Briles' residence.

From the trial evidence the jury could possibly conclude that Smith removed the property from Briles' residence. However, it is just as likely that Cellecz or an acquaintance of his stole the property from the house. Corroborating evidence proved that Cellecz was in possession of property recently stolen from Briles' house. The only evidence that Smith was in possession of stolen property the day after the murder was the word of Cellecz, a convicted felon searching for an explanation of how he came to be in possession of stolen property. The State did not present

evidence of Cellecz' whereabouts at the time of the murder. There was evidence a carpenter was work daily in the Briles' residence but he did not show up on the day of the murder. The evidence points to the reasonable hypothesis of innocence that Cellecz or an acquaintance of his committed the murder.

The Threat Evidence

Joshua Hull, an inmate in Manatee County Jail and eight time convicted felon, was on the transport bus with Smith returning to county jail after he was sentenced in April of 2010. That is the first time Hull ever had contact with Smith. Smith asked Hull where he was housed and if he knew inmate James Cellecz. Hull knew Cellecz from playing cards and walking around the dorm. Smith told Hull to tell him he had "something for his ass." Smith said, "tell him I still know where Stephanie and Gavin are and I have something for them." Stephanie and Gavin are Cellecz' wife and child. Smith was upset because he had given Cellecz some jewelry and stuff to pawn and Cellecz was snitching on him. (14/2447-2451)

Hull was concerned about an observation camera at the front of the bus that was close to where he was sitting. Hull was hoping the camera did not have audio because someone was asking him to communicate a threat. Although Hull testified there was a video camera in the front of the bus and he was concerned about his conversation being recorded, no video evidence was presented to corroborate Hull's testimony. Hull tried to bargain his testimony for a reduction of his sentence from five years to three years or a transfer to a closer facility.

The alleged communication Smith had with Hull was so vague that it could not be tied into having anything to do with the murder of Kathleen Briles. There was evidence that Cellecz and Smith often traded or sold goods back and forth. Smith was in jail on pending charges other than the murder. The testimony Hull provided was so general and vague it could not be considered a threat trying to prevent Cellecz from testifying in Smith's murder trial. Nothing in the alleged threat mentioned trying to get Cellecz not to testify at trial. Hull's testimony was nothing more than evidence of other bad acts and had no or little probative value in determining the identity of the actual killer.

Phone Calls to Tejeda

After Smith went to jail, he called Martha Tejeda and asked her to get some of his property, including a big duffle bag, from storage. Smith made several phone calls asking Tejeda to obtain his belongings from his storage unit. Smith told Tejeda to take all the bags. He said there was a small laptop in one of the bags. There is something inside one of the bags and it was very important that she get it out the next day. (13/2198) As learned in penalty phase there was a computer taken in the Sarasota burglary. However, during the phone conversation with Tejeda, Smith never mentioned any items that came from the Briles' residence. There was no testimony as to who put the items in the storage unit. There was testimony that at some point while Smith was in jail, Cellecz had access to Smith's storage unit.

Nothing in the phone conversation between Smith and Tejeda

indicated anything about the murder of Briles. There was no mention of any specific items that came from the Briles residence. The jury heard, although they should not have, that Smith was the subject of an investigation for the City of Sarasota. Since there was a pending investigation regarding the Sarasota burglaries, any items that Smith was asking Tejeda to retrieve could have been related to the Sarasota cases and not the Briles murder. The State did not eliminate the reasonable hypothesis of innocence that the items Smith was concerned about Tejeda retrieving came from or were used in the Sarasota burglaries.

Conclusion

The State's circumstantial evidence was insufficient as a matter of law to establish Delmer Smith killed Kathleen Briles. There was no proof that Smith was ever inside the Briles' residence. Smith was not found in actual physical possession of items removed from the Briles' residence and there was no evidence of how they came to be in his constructive possession. The cell phone evidence placed Smith's cell phone near the Briles' residence on the day of the killing. The State's evidence was not inconsistent with the hypothesis that Cellecz or some other person committed the murder, such as the carpenter who came to the house every day, except for the day of the murder. The State's own evidence revealed an unidentified fingerprint on the duct tape used to bind Briles and did not eliminate the hypothesis that fingerprint belonged to the actual killer. Remarkably, no DNA sweat evidence was found at the crime scene in the middle of the

afternoon on a Florida summer day. The State's own evidence suggested that there was a bloody crime scene as evidenced by the fact Dr. Briles' hands were covered in blood when the police arrived, yet no blood evidence was found on any of Smith's belongings or his vehicle. The judgments and sentences must be reversed, and this case must be remanded to the trial court with directions to discharge Delmer Smith as was done in Jaramillo and Ballard.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE INVESTIGATOR INDICATED SHE WAS DOING AN INVESTIGATION FOR THE CITY OF SARASOTA.

The murder Smith was accused of committing occurred in Terra Ceia in Manatee County. The City of Sarasota is in Sarasota County, a different county from where the murder of Kathleen Briles took place. The detective improperly revealed that she was doing an investigation for the City of Sarasota. The impact on the jury is that they learned that Delmer Smith was being investigated for other crimes that occurred in the City of Sarasota.

Detective Linda Deniro, a police officer with the City of Sarasota, participated in an investigation involving Smith. (14/2338) Deniro testified as follows:

> Q. As part of that investigation did you speak to someone named Michele Quinones?
>
> A. I did.

> Q. And did she give you some of the defendant's property?
>
> A. Yes, she did.
>
> Q. How did that exchange come about?
>
> A. Regarding my investigation that I was doing for the City of Sarasota— -
>
> Q. Well let me stop you there. What I meant was, did she call you, did you call her, how did she give you the property?
>
> A. Oh, I called her, we talked, and she said she had some property she would like to turn over to the Sarasota Police Department. At that time I - -

(14/2338, 2339) At that point defense counsel objected and moved for a mistrial because the detective made reference to an investigation for the City of Sarasota which was an unrelated case. The trial court stated:

> It was a very poor choice of words by the detective. After 23 years in the force, she should have known better than to talk like that. I believe her exact words, we can look it up, but I believe her exact words was the investigation I was doing for the City of Sarasota.
>
> "Regarding my investigation that I was doing for the City of Sarasota" is exactly what she said.
>
> All right, in light of the fact that investigations were being conducted in multiple cities, and by multiple agencies, I don't think the jury would draw the inference that there was a separate investigation that this officer was working on behalf of the City of Sarasota for. While that is certainly a possible inference that could be drawn, in the context of this case I don't find that it rises to the level that would require a mistrial. Motion is denied.

In a criminal trial it is usually improper to admit evidence

showing the accused has committed other crimes. The trier of fact should always focus on a defendant's guilt or innocence of the crime charged and should not be diverted by unrelated matters. Craig v. State, 510 So. 2d 857, 863 (Fla. 1987). The comment by Deniro that she was doing an investigation for the City of Sarasota certainly made known to the jury that there was a separate crime or crimes Smith was being investigated for that did not occur in Manatee County where the murder of Briles took place. Even the prosecutor knew this was a big problem and immediately stopped Deniro. However, the damage was done and the trial court should have granted the mistrial.

In the instant case, the evidence relied on by the state to persuade the jury that Appellant committed the offense of first degree murder was limited to circumstantial evidence. The notion that Smith was under investigation in Sarasota was collateral crime evidence that improperly bolstered the circumstantial evidence that was presented in an attempt to prove the murder. This collateral crime evidence placed before the jury inadmissible information that Appellant has a propensity to commit crimes. It was error for the trial court to deny Appellant's motion for mistrial.

Due to the limitations of the circumstantial evidence, any doubt the jury had as to the guilt of Appellant, was diminished by this improper collateral crime evidence which surely would have swayed the jurors in the direction of a conviction. This propensity type evidence is similar to that presented in Jackson

v. State, 627 So. 2d 70 (Fla. 5th DCA 1993). Jackson was reversed and remanded for a new trial. Jackson was on trial for the robbery of Beverly Fowler, a convenience store clerk. The suspect could not be identified from the surveillance video. A few days after the robbery, Fowler was under the influence of some medication and was still too emotional to make an identification from a photo lineup. A week later Fowler picked Jackson out of the lineup. At trial Fowler identified Jackson as her assailant. Fowler was the only eyewitness and no fingerprints were lifted from the crime scene.

At trial, the detective working on the case was asked how he first learned of a possible suspect. He replied:

> Detective Bauman notified me that an individual had been taken in on another charge and he fit the description that had been issued to all the officers of the suspect case.

Defense counsel objected and moved for mistrial on the ground's that the statement was prejudicial because its sole relevance was to prove appellant's bad character or propensity to commit the crime charged. The trial court denied the motion for mistrial. The Fifth District found it was reversible error not to grant the mistrial. Id. at 71. "Erroneously admitted collateral crime evidence is not harmless where identification of the defendant as the perpetrator of the crime charged rests upon the testimony of a single eyewitness." Id. at 72.

In the present case, there were no eyewitnesses. Deniro's

testimony informed the jury that Smith was under investigation for crimes committed in Sarasota County. The jury was well aware that Briles murder took place in Manatee County not Sarasota County. Because it cannot be said that this collateral crime evidence could not have affected the verdict, a new trial should be granted. Ciccarelli v. State, 531 So. 2d 129 (Fla. 1988).

The standard of review applicable to the consideration of whether collateral crime evidence was properly admitted is abuse of discretion. Wright v. State, 19 So. 3d 277, 291 (Fla. 2009). In this case, the evidence of the prior bad act was irrelevant and only showed Appellant's bad character and propensity to commit crime. Such evidence is unfairly prejudicial and must be excluded. Castro v. State, 547 So. 2d 111, 114-15 (Fla. 1989); Peek v. State, 488 So. 2d 52, 55-56, (Fla. 1986). The improper admission of collateral crime evidence is presumed harmful because the trier of fact might take the bad character or propensity to commit crime as evidence of guilt of the crime charged. Id. at 56. Evidence that the defendant has committed a similar act will often lead to a more ready belief by the trier of fact that he might have committed the crime with which he is charged thereby leading to a predisposition of the accused's guilt. Bricker v. State, 462 So. 2d 556, 559 (Fla. 3d DCA 1985).

Testimony of other bad acts may be admissible if relevant to prove a material fact in issue, but is inadmissible when the evidence is relevant solely to prove bad character or propensity for misconduct. Williams v. State, 110 So. 2d 654 (Fla. 1959),

cert. denied, 361 U.S. 847 (1959). The collateral crime evidence of Appellant being under investigation by the City of Sarasota was completely irrelevant as to whether or not he committed the murder in Manatee County. This was presumptively harmful because of the danger that the jury will take the bad character or propensity to commit crime as evidence of guilt of the crime charged. Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). The impact of the collateral crime evidence was compounded in this case because there were no witnesses to the crime, no physical evidence placing Appellant at the crime scene, and no proof Appellant was ever inside the residence where Briles was murdered. This is a classic situation in which evidence of other crimes or bad acts is inadmissible, and its introduction harmful and reversible error. Appellant is entitled to a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE SMITH'S STATEMENTS TO JOSHUA HULL. THE STATEMENTS WERE TOO VAGUE TO BE CONSIDERED THREATS AND ANY PROBATIVE VALUE IS OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, CONFUSION OF ISSUES OR MISLEADING THE JURY.

On July 5, 2012, the State filed a notice of intent to use evidence of other crimes, wrongs, or acts committed by the defendant (threats to James Cellecz), pursuant to Section 90.404(2), Florida Statutes (2011). The motion alleged that Smith knowingly used intimidation or physical force, or threatened another person, with the intent to cause or induce James Cellecz

to withhold testimony from an official proceeding, to wit: a trial, contrary to Section 914.22(1)(a) Florida Statutes. The State intended to introduce this evidence of other crimes, wrongs, or acts as proof of Defendant's consciousness of guilt. (2/225, 226) The trial court granted the State's notice of intent to use evidence of other crimes, wrongs, or acts on July 26, 2012. (2/269-271) The admission or exclusion of evidence is subject to an abuse of discretion standard of review. Kopsho v. State, 84 So. 3d 204, 217 (Fla. 2012).

Prior to Joshua Hull being called as a witness defense counsel renewed his objection that Hull's testimony is extrinsic and should not be admitted. (14/2446) This issue is preserved for appeal because the court allowed defense to have a continuing objection as to the admissibility of Hull's testimony. Womack v. State, 855 So. 2d 1236, 1237 (Fla. 1st DCA 2003).

Joshua Hull knew Cellecz from playing cards and walking around the dorm in jail. After Hull told Smith he knew Cellecz, Smith told Hull to tell him he had "something for his ass." Smith said, "tell him I still know where Stephanie and Gavin are and I have something for them." Smith said Stephanie and Gavin are Cellecz' wife and child. Smith was upset because he had given Cellecz some jewelry and stuff to pawn and Cellecz was snitching on him. (14/2447-2451)

Hull was concerned about an observation camera at the front of the bus that was close to where he was sitting. Hull was hoping the camera did not have audio because someone was asking him to

communicate a threat. (14/2454) No video from the bus was ever shown in court to substantiate Hull's testimony. Hull was obviously trying to use his testimony to obtain a reduced sentence or placement at a closer correction institution.

None of the statements Smith allegedly made to Hull mention anything about Cellecz testifying in Smith's murder trial. The statements were vague as there was no elaboration at to what the "something" was that he had for Cellecz or his family. The "something" was not tied to trying to get Cellecz to refrain from testifying at Smith's trial. None of the statements include any admissions by Smith of being involved in the murder. This was evidence of collateral crimes that was not relevant to prove Smith committed the murder.

There was nothing in Smith's alleged statements to Hull that indicated the "jewelry and stuff" was the same property taken from the Briles' residence and there was no indication what Cellecz was allegedly "snitching" about or whether the alleged "snitching" by Cellecz was true. Smith could have very well been upset because the "snitching" Cellecz was doing was not true. Any probative value of the testimony certainly was outweighed by the prejudicial impact of the statement, "I have something for his ass". It is not clear what that statement means, but it could have all kinds of prejudicial ramifications in a prison setting. Hull's testimony was irrelevant and should have been excluded. Fulton v. State, 523 So. 2d 1197 (Fla. 2d DCA 1988)

In Fulton the State presented evidence that subsequent to his arrest for aggravated assault Fulton followed the victim's car on one occasion and drove past the victim's house and place of employment on several occasions. The Second District found that since the collateral crime evidence was not similar to the charged offense nor relevant to proving a material fact in issue, the trial erred in permitting the state to present the collateral crime evidence. The collateral crime evidence created the risk that Fulton would be convicted based upon his apparent bad character or propensity to commit crimes. Notwithstanding the State presented sufficient evidence to sustain a conviction, since the court could not find beyond a reasonable doubt that the inadmissible evidence did not contribute to the jury's verdict, Fulton's conviction was reversed and remanded for a new trial. Id. at 1198.

The statements testified to by Hull are more general and vague than the statements in Manly v. State, 640 So. 2d 142 (Fla. 4th DCA 1994) where the court found the admission of Manly's statements to a witness was reversible error. Although Manly is no longer good law on this point, it provides guidance on why the trial court erred in permitting Hull to testify about collateral crime evidence.

Sometime before trial, Manly telephoned a minor child witness and threatened him. The child testified: "she told me [that] if she went to jail that I'd pay 'you little S.O.B.'" The court in

Manly reasoned that the collateral crime or bad act is not relevant to prove any element of the crime charged.

Appellant acknowledges that Manly was receded from in Jenkins v. State, 697 So. 2d 228 (Fla. 4th DCA 1997) to the extent that Manly suggests that threats made against a witness by a defendant are inadmissible to demonstrate the defendant's guilt. However, the Fourth District was quick to point out that the admission of such evidence is still subject to Florida Rule of Evidence section 90.403, and may be excluded if the probative value is substantially outweighed by unfair prejudice.

In Jenkins, the probative value was not substantially outweighed by unfair prejudice because Jenkins made a direct threat to an eye witness of Jenkins killing the victim. After Jenkins killed the victim, he pointed a gun at the witness and threatened to kill him and his grandmother if he said anything. Id. at 229. Such testimony certainly had probative value as to whether or not Jenkins committed the murder.

In the present case, Smith did not associate his vague statements, that he had something for Cellecz and his family, with testifying at trial. It is not really clear what Smith was saying when he had something for Cellecz. Smith and Cellecz were known to have bought, sold, and traded items back and forth. It is not clear that Smith could have been referring to some items he had for Cellecz and his family. It certainly is not clear that Smith's statements were threats designed to cause Cellecz not to testify in his murder trial.

Smith's statement that he was upset because he had given Cellecz some jewelry and stuff to pawn and Cellecz was snitching on him is not a clear admission that Smith had anything to do with the murder. It is unknown if the "jewelry and stuff" were the same items that Cellecz actually pawned. In cases where collateral threats were allowed into trial, such as in Jenkins, there were clear threats designed to prevent a witness from testifying. That is not the case here where Smith's statements are vague and are open to interpretation as to what he meant. Smith's statements do not link him to the murder without stacking inference upon inference. Because of the vagueness of Smith's statements the probative value is minimal and substantially outweighed by the significant unfair prejudice, confusion of issues or misleading the jury. The trial court abused its discretion and should have excluded Hull's testimony regarding Smith's statements pursuant to Section 90.403 Fla. Stat. (2012). Since it can not be found beyond a reasonable doubt that this inadmissible evidence did not contribute to the jury's verdict, Smith's conviction should be reversed and remanded for a new trial. See State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

ISSUE IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR A CONTINUANCE.

This case was scheduled for trial to begin on July 30, 2012. Appellant and the State filed motions for continuance on July 20

and July 23. (20/3133-3138, 3143-3146) At the hearing on July 26, 2012, Defense counsel (Hernandez) argued he only recently learned that the State's fingerprint expert had checked for fingerprints on every page of the medical encyclopedia. As an additional ground for a continuance, Hernandez wanted to hire a fingerprint expert to check every page of the medical encyclopedia. (7/890) In its written order denying a continuance the court indicated that the request for continuance for the defense to obtain a fingerprint expert had not be reduced to writing and the court was not asked to rule on that request. (20/3147-3150) In response, Hernandez filed an amended motion for continuance on July 27, 2012, to include a written request to allow time to obtain a fingerprint expert. (20/3151-3155)

On July 30, 2012, Hernandez argued it would be ineffective assistance of counsel if they did not have their own fingerprint expert examine the medical encyclopedia. (7/918, 919) The prosecutor (Iten) indicated that his fingerprint expert compared the prints of federal inmate Alex Ramos using facsimile prints and no additional identification was made. The expert was awaiting arrival of mailed prints to confirm his findings. Iten agreed that if a federal inmate's prints appeared on the medical encyclopedia, it would be exculpatory evidence because there were no prints of any members of the Briles family on the medical encyclopedia. There were some palm prints discovered in the medical encyclopedia and they did not have Ramos' palm prints. (7/919-921) After the trial court denied the continuance, Hernandez asked to be able to

make arrangements to have Alex Ramos, a federal prisoner, testify. (7/924) The motion for continuance was denied. (7/925)

The granting of a motion for continuance is within the trial court's discretion, and the court's ruling will only be reversed when an abuse of discretion is shown. Kearse v. State, 770 So. 2d 1119, 1127 (Fla. 2000). In denying the motion for continuance the trial court stated: "I think if the Defense had been concerned about the unreliability of the State's appraisal of the evidence it could have asked for a fingerprint expert over these past couple of years." (7/922) The trial court's assessment of the situation was not accurate because defense counsel had just learned about the fingerprint expert's results days before the July 26th hearing. The trial court abused its discretion in denying the motion for continuance because the court's ruling denied Appellant his due process rights of effective assistance of counsel and fair trial as guaranteed by the United States and Florida Constitutions. This was a significant piece of evidence. If federal inmate Ramos' fingerprints were on the encyclopedia it would have proved that Smith had the Encyclopedia in federal prison and it was not the same Encyclopedia claimed to have been in the Briles' residence.

The only piece of physical evidence where Appellant's fingerprint was found was on the medical encyclopedia. James Briles and Calvin Briles testified this was the same medical encyclopedia that was in the Briles' residence on the day of the murder. Calvin Briles said he had borrowed the encyclopedia, but

had returned it to his parents' house in May of 2009. This was a key piece of evidence that the prosecution used to link Appellant to the crime scene. Appellant was denied the opportunity to hire a fingerprint expert to establish Smith had possessed the encyclopedia in federal prison. Even Iten agreed that if a federal inmate's (Alex Ramos) prints appeared on the medical encyclopedia, it would be exculpatory evidence because there were no prints of any members of the Briles family on the medical encyclopedia. Hernandez was also denied time to make arrangements to have federal inmate Ramos testify at trial.

The First District, in McKay v. State, 504 So. 2d 1280 (1st DCA 1986), and the Fourth District in D.N. v. State, 855 So. 2d 258, 260 (Fla. 4th DCA 2003), established the following factors to be considered in determining whether the denial of a continuance requested due to lack of preparation time is error: 1) the time available for preparation, 2) the likelihood of prejudice from the denial, 3) the defendant's role in shortening the 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. In Brown v. State 66 So. 3d 1046, 1049 (Fla. 4th DCA 2011), the Fourth District noted: "While the trial court appeared frustrated by the defendant's last minute request, it was incumbent on the court to review the criteria before denying the motion simply to move the case to trial." In the present case the trial court

abused its discretion by failing to consider the criteria when evaluating a motion for continuance. The trial court was more concerned with moving the case to trial than insuring that Appellant received a fair trial.

Although Hernandez had been representing Smith for about twenty months, he had just recently learned of the findings of the State's fingerprint expert after examining every page of the medical encyclopedia. The prints used by the State's fingerprint expert to eliminate Ramos were facsimile prints and the results were not conclusive. Furthermore there were unidentified palm prints on the encyclopedia and the State's fingerprint expert did not have Ramos' palm prints. It was an abuse of discretion for the trial court not to allow Appellant time to hire an independent fingerprint expert and to allow time to bring Ramos to court to testify.

Hernandez did not have time to adequately prepare a defense to Smith's fingerprint being found on the medical encyclopedia. Smith was highly prejudiced by the denial of time to prepare a defense which would show that the medical encyclopedia was possessed by Smith in federal prison and was not the same medical encyclopedia that had been in the Briles residence. Smith played no role in shortening the preparation time. This case was extremely complex because of the lack of conclusive physical evidence, no eyewitnesses, and the reliance on circumstantial evidence. The discovery regarding the fingerprint evidence that Ramos' print was not on the encyclopedia was only available a week

before Hernandez filed his motion for continuance. The trial court did not address the adequacy of counsel or the skill or expertise of the attorneys appointed to represent Smith. At the very least, the trial court should have provided a full consideration of the circumstances to determine if a continuance was needed to ensure Appellant's right to counsel and a fair trial. Id. at 1049. The trial court abused its discretion by not giving full consideration to the criteria established in McKay and D.N..

"The common thread running through those cases in which a palpable abuse of discretion has been found is that defense counsel must be afforded an adequate opportunity to investigate and prepare any applicable defense." Smith v. State, 525 So. 2d 477, 479 (Fla. 1st DCA 1988). Appellant should have been allowed the opportunity to investigate and prepare his defense that the medical encyclopedia in his possession was not the one that had previously been in the Briles residence. Even the prosecutor agreed that if a federal inmate's prints appeared on the medical encyclopedia, it would be exculpatory evidence because there were no prints of any members of the Briles family on the medical encyclopedia. This would have been significant evidence refuting the State's circumstantial case. Although deference must be given to the trial court's ruling on a motion for continuance it will be reversed when the record demonstrates that adequate preparation of a defense was placed at risk by virtue of the denial. Smith v. State, 525 So. 2d at 480. Since defense counsel did not have time to adequately prepare his defense, this case must be reversed and

remanded for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATTROCIOUS, OR CRUEL.

This aggravating circumstance applies only where there is proof beyond a reasonable doubt that the victim experienced prolonged physical pain or mental anguish. Here, the evidence established that the victim may have been killed or rendered unconscious by the first blow to the head. Accordingly, this aggravating circumstance cannot be sustained.

The standard of review is a trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by competent, substantial evidence. Almeida v. State, 748 So.2d 922, 932 (Fla. 1999). Competent, substantial evidence means legally sufficient evidence. Id. at 932.

In finding this aggravator, the trial judge stated:

> The Court will begin its analysis by focusing on the experience 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 the 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 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 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.
>
> This Court gives this circumstance great weight.

The especially heinous, atrocious, and cruel aggravating circumstance (HAC) applies "only in torturous murders," those that inflict "a high degree of pain," either physical or mental. See Shere v. State, 579 So.2d 86, 95 (Fla. 1991); Rose v. State, 787 So.2d 786, 801 (Fla. 2001). A few minutes are enough if the victim is conscious. See, e.g., Brown v. State, 721 So.2d 274, 277 (Fla. 1998). A finding of HAC, however, cannot be based on

the mere possibility that the victim may have suffered extreme pain or mental anguish. See Brown v. State, 644 So.2d 52, 53 (Fla. 1994)(medical examiner's testimony that victim had been stabbed 3 times and none of wounds was immediately fatal held insufficient to prove HAC); Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996)(speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field insufficient to support HAC). In order to sustain the aggravating circumstance, there must be "no doubt" the victim suffered physical or mental torture. See Chavez v. State, 832 So.2d 730, 765 (Fla. 2002)(HAC properly found where victim, who was held captive for 3-1/2 hours, twice asked defendant if he was going to be killed and was sobbing throughout this period).

Accordingly, although a beating usually will cause a high degree of pain, this Court has rejected the HAC factor in beating deaths where the victim may have been rendered unconscious after the first blow. See Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1998)(trial court erred in finding HAC where medical examiner's testimony established that victim may have been rendered unconscious upon receiving first blow from the crowbar); Elam v. State, 636 So.2d 1312, 1314 (Fla. 1994)(trial court erred in finding HAC where medical examiner testified attack took place in a very short period of time and victim was unconscious at end of this period).

In the present case, contrary to the trial court's finding,

the evidence did not show that Briles was alive or conscious after receiving the first blow. The medical examiner could not determine which blow came first or which blow caused the death. "The first blow, although less likely, could have caused the death, if it was a major blow, or it could have been a combination of several blows. There is no way to tell how long the victim was conscious after the first blow." (13/2130) "The cause of death was multiple blunt force head trauma." (13/2131)

In finding HAC, the trial judge did not refer to the medical examiner's testimony that the first blow could have caused death and there was no way to tell how long the victim was conscious after the first blow. The trial judge ignored portions of the medical examiner's testimony, and speculated about the circumstances of the crime scene. There was not competent substantial evidence to support the trial judge's finding that displacement of the furniture about the house evidenced at least some futile resistance put up by Ms. Briles. The furniture could have been displaced in a fit of anger or in search of something.

The medical examiner testified there was a laceration above the left eyebrow and areas of contusion and slight abrasion. There was another abrasion on the tip of the nose consistent with having occurred while alive. The most likely scenario for injuries above the eyebrow is that they occurred while face down sustaining several blows to the back of the head. This description of the victim's ordeal suggests that she was face down and would not have known of her impending fate. Nothing indicated that the

victim was aware she was going to be struck with the sewing machine before it occurred. The trial judge's inferences are not reasonable nor are they the only inferences that can be drawn from the evidence. The evidence does not to prove the victim was conscious after the first blow from the sewing machine.

Although the medical examiner testified Briles was alive when her liver was lacerated, there was no testimony that she was conscious. The injury to the liver could have been sustained within seconds of Briles losing consciousness. The medical examiner's testimony was that the first blow could have caused death and there was no way to tell how long she was conscious after the first blow.

Evidence of pain or fear of impending death must be based on more than mere speculation. Aggravating factors require proof beyond a reasonable doubt, not mere speculation derived from equivocal evidence or testimony. Brooks v. State, 918 So.2d 181, 206 (Fla. 2005). Here, while the trial court's speculation as to what took place may have occurred, there is no evidence in the record to rule out other possible scenarios (the furniture was displaced in a fit of anger or after Briles was tied up, that she was face down and not aware of the impending attack, she was dead or unconscious after the first blow, etc.).

The fact the medical examiner determined Briles was alive when she was bound with duct tape does not require a finding of HAC. In Rimmer v. State, 825 So. 2d 304 (Fla. 2002) the victims were told to lie face down on the floor and their hands were tied

behind their back with duct tape. Rimmer did not beat or torture the victims. When Rimmer finished loading stereo equipment into the car, he asked victim Knight if he remembered him and then fired a single shot into the head of Knight and Krause. The fact the victims were forced to lie on the floor with hands bound while Rimmer robbed the store is insufficient to assume that Knight and Krause knew they would be killed or that they lay there in fear of their impending deaths. "While Knight and Krause no doubt experienced fear during this criminal episode, it was not the type of fear, pain, and prolonged suffering that this Court has found to be sufficient to support this aggravating circumstance." Id. at 328. This Court found that the trial court erred in finding the HAC aggravating circumstance. Id. at 329

In the present case, the first blow could have rendered the victim unconscious. Anything occurring after Briles became unconscious can not support a finding of HAC because "the evidence must show the victim was conscious and aware of impending death." Williams v. State, 37 So. 3d 187, 199 (Fla. 2010). This Court has upheld HAC in beating deaths. 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); Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995) (upholding HAC where the victim was struck seven times on the head, victim was alive during infliction of most of the wounds, and the last blow caused death); Wilson v. State, 493 So.

2d 1019, 1023 (Fla. 1986) (upholding HAC where the victim was brutally beaten while attempting to fend off blows before being fatally shot).

However, the present case is more like cases where the HAC aggravator was stricken where there was not competent, substantial evidence to support the trial court's finding that the victim was conscious and aware of impending death. See, Zakrzewski v. State, 717 So. 2d 488, 493 (Fla. 1998)(striking HAC where "[m]edical testimony was offered during the trial which established that [the victim] may have been rendered unconscious upon receiving the first blow from the crowbar, and as a result, she was unaware of her impending death"); Simmons v. State, 419 So. 2d 316, 317, 319 (Fla. 1982)(striking HAC where "[d]eath was probably instantaneous or nearly so; an expert testified that either of the two blows could have caused instantaneous death by itself"); Williams v. State, 37 So. 3d 187 (Fla. 2010)(striking HAC where there was not competent substantial evidence to support trial court's finding that the victim was conscious during the attack. There was testimony that any of the five blows to the head could have rendered the victim unconscious or caused death.)

In the present case there were no defensive wounds. The State failed to prove there was prolonged suffering or anticipation of death, and it was error for the trial judge to instruct the jury on this aggravating circumstance or to consider this aggravating circumstance as a reason for imposing the death penalty. As in Simmons, 419 So. 2d at 320, where this Court

struck two aggravating circumstances, Smith is entitled to a new sentencing hearing before a new specially empanelled jury where consideration of HAC is excluded.

ISSUE VI

THE TRIAL COURT ERRED IN FAILING TO FIND TWO STATUTORY MITIGATING CIRCUMSTANCES: I, APPELLANT'S ABILITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED. II. THE CAPITAL FELONY WAS COMMITTED WHILE APPELLANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

A trial court may reject a mitigating circumstance only if the record contains competent substantial evidence to support that rejection. The trial court must find a mitigating circumstance if it "has been established by the greater weight of the evidence." Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006).

Here, there was evidence presented by Dr. Eisenstein to establish both of these statutory mitigating circumstances: 1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; 2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. However, the trial judge rejected the defense expert's opinion based on seemingly conflicting evidence from the State's expert witnesses. Although the State's experts testified Smith had anti-social personality disorder and the PET

scan showed no brain damage, the State's expert did not specifically address the statutory mitigating circumstances. The trial court decision was also based on speculation and his own personal view that Smith's behavior on the day of the murder appeared rational and goal-directed. Accordingly, it was error for the trial court to find that these statutory mitigating circumstances were not established.

In rejecting these statutory mitigating circumstance, the trial court stated:

> 1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> During the penalty stage, the defense called Dr. Hyman Eisenstein, a licensed psychologist to testify about defendant's mental health. Dr. Eisenstein performed neuropsychological testing and conducted a clinical interview. After his examination, Dr. Eisenstein concluded that Mr. Smith has "unequivocal brain damage" and "brain impairment," and as a result of these deficits Mr. Smith's decision making ability is profoundly impaired. While Dr. Eisenstein also suggested Mr. Smith has an Antisocial Personality Disorder, he believes that "brain pathology" better explains Mr. Smith's behavior. Ultimately Dr. Eisenstein testified that Mr. Smith was under the influence of extreme mental and emotional disturbance and that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
>
> To bolster the testimony of Dr. Eisenstein, the defense requested that an MRI and a PET scan be performed. To interpret the results of these tests the defense asked the court to appoint Dr. Ruben Gur to analyze the results. The busy schedule of Dr. Gur resulted in a delay of approximately eight months before the Court held the Spencer hearing at which Dr. Gur and Dr. Eisenstein testified. At the Spencer Hearing, Dr. Gur testified that the brain testing revealed the

existence of frontal lobe damage which has major behavioral consequences for Mr. Smith, and Dr. Eisenstein repeated his previous conclusion that Mr. Smith lacks the ability to control himself in high pressure situations through his inability to control his "amygdale response." In fact, Dr. Eisenstein testified that Mr. Smith was subject to "amygdale meltdown" in highly stressful situations. Both doctors testified that Mr. Smith's brain damage inevitably led to disinhibited behavior; nevertheless, both doctors conceded that there was no current scientific consensus on the existence or degree of frontal lobe damage and the corresponding "disinhibited" behavior one might expect to see.

To rebut the testimony of Eisenstein and Gur, the State called Dr. Wade Myers to testify at the penalty phase before the jury and Dr. Helen Mayberg at the Spencer hearing. In brief, Dr. Myers opined that Mr. Smith had Antisocial Personality Disorder, and Dr. Mayberg opined that her review of the MRI and PET scan showed no brain damage whatsoever.

This brief recitation reflects that the opinion of the experts conflicted radically. It is the burden of the defendant to establish the existence of mitigating factors; and it is within the discretion of the Court to reject a statutory mitigator where the defense expert's testimony is rebutted by another expert. (footnote omitted) Since the Court finds the testimony of Dr. Myers and Dr. Mayberg more persuasive and convincing, the defendant failed to meet this burden. Even if frontal lobe damage exists (which the court does not find to be the case) there is simply no competent evidence to suggest that on August 3, 2009, Delmer Smith was under the influence of an extreme mental or emotional disturbance. (footnote omitted) All of his behavior on the day of the murder and the days after appears cold, calculated, rational, and goal-directed. Based on this evidence, the Court is not reasonably convinced of the existence of this factor.

2. The capacity of the defendant to appreciate the criminality of his conduct or

> to conform his conduct to the requirements of law was substantially impaired.
>
> For the reasons discussed in the preceding section the Court finds that the defendant did not meet his burden and this mitigator has not been proved.

3:451-452.

Mitigating circumstances need not be proved beyond a reasonable doubt but must be found if established by the "greater weight" of the evidence." Ferrell v. State, 653 So.2d 367, 371 (Fla. 1995); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990). Accordingly, whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved. Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). A trial court may reject a defendant's claim that a mitigating circumstance has been proved only if the record contains competent, substantial evidence to support the court's rejection. Id. at 1062; see also Cook v. State, 542 So.2d 964, 971 (Fla. 1989)(trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance). However, this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts and a misapprehension of law. Pardo v. State, 563 So.2d 77, 80 (Fla. 1990).

Thus, when expert testimony and opinion support a mitigating circumstance, a trial judge can reject the testimony and opinion only where the record contains substantial competent evidence to refute it. See Coday v. State, 946 So.2d at 1001. A sentencing judge thus can reject expert testimony when it cannot be reconciled with other evidence in the case. Id. at 1002. However, a judge cannot reject expert opinion based on the judge's personal opinion or lay experience. See Alamo Rent-A-Car v. Phillips, 613 So.2d 56, 58(Fla. 1st DCA 1992).

In the present case, Dr. Eisenstein, a licensed psychologist, testified that Smith met both of the statutory mitigators. Dr. Eisenstein based his opinion on neuropsychological testing he administered to Smith. Eisenstein opined that Smith has unequivocal brain damage. The objective neuropsychological testing indicates that Smith has brain impairment. Although Smith was able to improve his IQ, his basic brain functioning for judgment, reasoning, problem solving ability, executive functioning, and higher critical processing of information were three and four standard deviations from the norm which put him in the bottom 2 percent of the population. Smith's decision making ability and his ability to process information is profoundly impaired and indicative of cognitive neuropsychological brain impairment. (16/2749, 2750)

The trial court did not find, however, that Smith was under the influence of an extreme mental or emotional disturbance partly because all of his behavior on the day of the murder and the days after appears cold, calculated, rational, and goal-directed. Dr. Eisenstein testified that the planning of the robbery Smith engaged in did not deal with his issues of impulsivity and violence. The violence was not something planned. Eisenstein hypothesized Smith's reaction was one of shock. He got himself into more trouble by the inability to step away from a bad situation. "That's really where the frontal lobe comes in terms of the violent act. No pre-planning, but just sort of reactive in nature to a bad situation that went even worse." (16/2756)

The trial court has misconstrued how the statutory mitigating factor should be considered, as well as Dr. Eisenstein's testimony. Dr. Eisenstein's testimony focused on the effects of frontal lobe impairment and its effect on Smith's ability to control his behavior. Dr. Eisenstein testified that Smith committed the crime while under the influence of extreme mental or emotional disturbance and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (16/2784, 2785)

The State presented testimony of Dr. Wade Myers who is a medical doctor employed with Brown University in the Department of Psychiatry. Myers is not a psychologist and does not have

training in psychology. (16/2795) Although Myers did not find brain damage in Smith, he is not trained to interpret neuropsychological testing. Myers may not have found brain damage, but that does not mean it did not exist. The State did not present testimony from a psychologist educated to detect brain damage through neuropsychological testing. Myers simply did not have the training or skill to uncover the brain damage revealed by the neuropsychological testing.

Perhaps Myers did not find any brain damage because he did not testing for brain damage. Myers stopped his testing because it appeared that Smith was not in the mood to take any tests from Myers. Myers failed to perform any testing whatsoever on Smith simply because Smith appeared not to be in the mood to take his tests. Considering the circumstances, Smith's mood is understandable, but Myers failure to give tests is not. Myers did not have the education or training to refute Eisenstein's neuropsychological test results nor did Myers generate any tests himself that refuted Eisenstein's findings. Myers spoke with Smith for about an hour and 15 minutes. Myers did not testify that Smith did not have intermittent explosive disorder. There was not competent substantial evidence presented to negate Eisenstein's testimony.

Because Dr. Eisenstein's opinion was unequivocal and not refuted by another psychologist trained to interpret the neuropsychological testing, the trial judge improperly rejected the two statutory mitigating circumstances. The mitigating factor

of inability to conform behavior to the requirements of law and Smith acted under extreme mental or emotional disturbance were reasonably established by the greater weight of the evidence. Accordingly, the trial court erred in not considering these mitigating factors. Smith is entitled to a new sentencing because it cannot be said beyond a reasonable doubt that the failure to find these mitigating circumstances did not affect the imposition of sentence. DiGuilio v. State, 491 So. 2d at 1139.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING SMITH TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL PURSUANT TO RING V. ARIZONA.

This issue was preserved by Smith's Motion to Bar Imposition of Death Sentence on Grounds that Florida's Capital Sentencing Procedure is Unconstitutional under Ring v. Arizona. (2/205-216). The trial court denied the motion. (2/230, 231). The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital

sentencing context. Section 921.141, Florida Statutes (2003), does not provide for such jury determinations.

Smith acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla.); cert. denied, 123 S.Ct. 662 (2002); King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 123 S.Ct. 657 (2002).

Additionally, Smith is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005); Steele. At this time, Smith asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

Florida Statute section 921.141 requires the trial court to make "written findings of fact" that sufficient aggravating circumstances exist and that there are insufficient mitigating

circumstances to outweigh the aggravating circumstances. If the trial court does not make these required written findings it must impose a sentence of life imprisonment. Absence a judges findings of fact a life sentence must be imposed. In order for a maximum sentence of life to be increased to death, a trial court must make findings of fact. Ring requires that "if a state makes an increase in a defendant's punishment contingent on a finding of fact, that fact -no matter how the state labels it- must be found by a jury beyond a reasonable doubt." Ring, 536 U.S. at 602 (quoting Apprendi v. New Jersey, 530 U.S. at 482). Since the jury does not make the findings of fact necessary for imposition of the death penalty, Fla. Stat. section 921.141 stands in clear violation of Ring and Apprendi. The Statute is therefore unconstitutional under the Sixth, Eight, and Fourteenth Amendments of the United States Constitution.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Smith's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1 reverse and discharge Appellant; Issues 2-4, reverse and remand for a new trial; Issue 5, reverse for a new penalty phase; Issue 6 reverse for resentencing by the trial judge; Issue 7, vacate appellant's death sentence and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at Capapp@myfloridalegal.com, on this 8th day of April, 2014.

CERTIFICATION OF FONT SIZE

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

Respectfully submitted,

/S/Julius J. Aulisio

JULIUS J. AULISIO
Assistant Public Defender
Florida Bar Number 0561304
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.state.fl.us
jaulisio@pd10.state.fl.us
mjudino@pd10.state.fl.us

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

Jja